
United States Court of Appeals

NINTH CIRCUIT

No. 20967

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

Appeal from the United States District Court for the
District of Arizona, Hon. James A. Welch, Judge.

APPELLANT'S INTERIM OPENING BRIEF

FILED

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN LUSTIGER,

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UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
District of Arizona, Hon. James A. Welch, Judge.

APPELLANT'S INTERIM OPENING BRIEF

THE JOURNAL OF THE
ROYAL ANTHROPOLOGICAL INSTITUTE
OF GREAT BRITAIN AND IRELAND

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS OF JURISDICTION

A nineteen-count indictment was returned against the defendant MARVIN LUSTIGER, charging him with a violation of 18 U.S.C. Sec. 1341 (mail fraud). Each of the counts was identical except for the fact that the defendant was charged with defrauding a different person in each count (CT^[1] 2 - 22, inclusive).

On February 11, 1964, the defendant appeared before the Honorable James A. Welch, United States District Judge, and pled not guilty to each of the nineteen counts of the indictment (CT 23-25). Thereafter, and upon motion of the defendant, all of the proceedings were had in the Tucson Division of the United States District Court (CT 28-29).

On or about February 26, 1965, the defendant moved the Court to dismiss the indictment or, alternatively, moved for disclosure of the Minutes of the Grand Jury (CT 30-35). This motion was denied on March 20, 1965 (CT 327).

On or about March 15, 1965, defendant brought on for hearing before the United States District Court a MOTION TO DISMISS FOR LACK OF JURISDICTION; FOR INADEQUACY OF EVIDENCE BEFORE THE GRAND JURY TO SUSTAIN THE INDICTMENT; AND, IN THE ALTERNATIVE, ON THE GROUND THAT 18 U.S.C.A. 1341 AND THE INDICTMENT HEREIN ARE UNCONSTITUTIONAL IF THE INDICTMENT HEREIN STATES AN OFFENSE AGAINST

[1] As used herein, CT refers to the Clerk's Transcript on Appeal and RT refers to the Reporter's Transcript on Appeal.

THE UNITED STATES UNDER 18 U.S.C.A. 1341, AND MEMORANDUM OF POINTS AND AUTHORITIES AND NOTICE; AND A MOTION TO DISMISS INDICTMENT ON THE GROUNDS EACH COUNT FAILS TO STATE AN OFFENSE AGAINST THE UNITED STATES AND EACH COUNT IS DUPLICITOUS (CT 36-50 and 51-58, respectively). These motions were denied (CT 327). On said date, and in addition, defendant made a MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, AND TO TAKE THE DEPOSITION OF DOYLE C. MARSHALL IN ORDER TO AFFORD DEFENDANT WITH DUE PROCESS UNDER THE UNITED STATES CONSTITUTION, AND MEMORANDUM OF AUTHORITIES AND NOTICE (CT 59-65). Further, and on said date of March 15, 1965, defendant made a MOTION FOR DISCOVERY AND INSPECTION UNDER RULE 16 FRCrP AND MEMORANDUM AND NOTICE (CT 66-75) and a MOTION FOR BILL OF PARTICULARS AND MEMORANDUM OF AUTHORITIES AND NOTICE (CT 76-84). An Affidavit, together with supporting documentation, was filed in connection with and in support of all of the above referred to motions (CT 85-194, inclusive). These motions were denied without prejudice to renew them at the end of the government's case (CT 327-328).

On or about April 3, 1965, a pretrial was held in the instant case. At the pretrial, many of the documents which were introduced into evidence or offered for introduction into evidence were marked for identification. Further, waivers of foundation as to these documents were obtained and other relevant orders were made. Finally, numerous stipulations were entered into between the parties to the action.(CT 195-230) The effect, significance and admissibility of the information contained in many or all of the stipulations will be discussed in later portions of this brief.

On or about June 15, 1965, the defendant and his attorney waived special findings of fact, which waiver was consented to by the United States Attorneys' office (CT 231).

On or about June 28, 1965, defendant was convicted of violating Title 18, U.S.C. Sec. 1341, as charged in Counts I to VIII, inclusive, and Counts XI to XIX, inclusive, of the indictment. The defendant was fined the sum of \$1,000.00 on each of Counts I to VIII, inclusive, and Counts XI to XVIII, inclusive. The imposition of sentence on Count XIX was suspended for a period of six months on condition that the fines imposed on Counts I to VIII, inclusive, and Counts XI to XVIII, inclusive, be paid within 90 days from the date of judgment (CT 232).

On or about June 28, 1965, counsel for the defendant and counsel for the United States Government stipulated that the cashier's check in the sum of \$14,000 payable to the Clerk of the United States District Court for the District of Arizona, which deposit was posted simultaneously with the filing of the said stipulation, together with \$3,000 which the defendant had theretofore posted for bail, could serve as bond pending further proceedings in the trial court and in the United States Court of Appeals for the Ninth Circuit and in the United States Supreme Court, by application for *certiorari* or otherwise. It was further stipulated that should the judgment entered on June 28, 1965, be finally affirmed on appeal, the total sum of \$17,000 would be applied by the Clerk to the payment of the fines imposed by the judgment, and if the judgment was reversed, then the said sum of \$17,000 would be returned to the defendant (CT 233).

In July, 1965, the defendant filed a MOTION FOR JUDGMENT OF ACQUITTAL (CT 234-236) and a MOTION FOR NEW TRIAL (CT 237-305, inclusive). The government filed a Memorandum in Opposition to both of said Motions on or about October 25, 1965 (CT 306-312). The defendant filed a REPLY MEMORANDUM OF DEFENDANT ON MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL (CT 313-316) on or about November 12, 1965.

On or about January 24, 1966, defendant filed a NOTICE OF APPEAL (CT 317-318). On February 3, 1966, by stipulation, time was extended for the defendant to print, serve and file the record on appeal and take all steps necessary in the prosecution of his appeal (CT 319), and the Court ordered the extension of time (CT 320). Appellant's designation of record on appeal was filed on February 2, 1966 (CT 321-323), and the government's DESIGNATION OF ADDITIONAL PARTS OF THE RECORD ON APPEAL was filed on February 3, 1966 (CT 324).

This Court has jurisdiction to review the judgment of the District Court, pursuant to 28 U.S.C., Sections 1291 and 1294.

[Several of the references to the Clerk's Transcript may not be accurate, because the copy of the transcript received by appellant's counsel is almost illegible from page 325 - page 328, inclusive.]

STATEMENT OF FACTS

A. Introductory Comment

Due to the pressure of time imposed upon appellant's counsel by the Court, this brief will have to be supplemented in the "Argument" portion at a later date.

Counsel has attempted herein to set forth as completely as possible the Statement of Facts and the points upon which appellant is relying.

The deficiency in the "Argument" section is the result of several factors. (1) The number of cases to be read relating to Federal "mail fraud" indictments alone is staggering (See Annotation under 18 USCA 1341) and a competent and professional analysis of these cases and the rules of law enunciated therein with relation to the facts of the instant case cannot possibly be accomplished within the time allotted by this Court. (2) The facts of the instant case are complex and the exhibits, both introduced and proffered but not received, are extremely numerous. In addition, there are many "stipulations" made prior to trial which have to be carefully scrutinized. (3) There are novel and esoteric questions of law and fact presented in this appeal which do not lend themselves easily to the ordinary type of legal research. (4) Finally, there is the tangential problem presented, not unrelated to this appeal, in that the appellant has presented substantial evidence to this Court by way of motions that by virtue of a real conflict of interest of trial counsel - unknown to appellant at the time of

trial (but possibly known to the government) - appellant was denied the opportunity to present a full defense and was, in fact, denied effective assistance of counsel.

The supplementary opening brief will therefore concern itself with such further detailed legal authorities as can be found which are applicable to the instant case; a further analysis of the facts herein as applied to the law; and a short synopsis of the matters which could/should have been presented to the court by trial counsel and the manner in which these matters would have substantially affected the outcome of the trial.

B. Summary of the Indictment^[2]

In the indictment, the defendant was charged with having devised a scheme and artifice to defraud within the provisions of the mail statute, by:

1. Organizing LM as a corporation, becoming an officer thereof, and actively engaging in its business (Para 2);
2. LM's use of P.O. Box 13349, Phoenix, Arizona, as the mailing address for LM (Para. 3);
3. Causing LM to enter into contracts to purchase approximately 35,000 acres of unimproved Mohave County land and subdividing some of them (Para. 4);

[2] As used in Section B of the Statement of Facts, all references are to Count I of the indictment, since the allegations in Count I were incorporated into the other counts. In addition, all references to LM contained in this brief are intended to refer to Lake Mead Land & Water Co., an Arizona corporation.

4. LM's offering for sale to the public parcels within such subdivision, on a payment in full or deferred payment plan, by means of advertising sent through the United States mail (Para. 5);

5. LM's entering into contracts with the public for the sale of parcels within such subdivision (Para. 6);

6. LM's using, in connection with the sale of such parcels, a brochure sent through the United States mail and containing the following allegedly false and fraudulent pretenses (Para. 7):

(a) "Join us for Pleasure and Profit at Lake Mead City, Arizona." [3]

(b) "Lake Mead City...an enchanted city in the making, a truly outstanding New Frontier for wise investors."

(c) "Lake Mead City. Arizona's best located planned community."

(d) "Invest in this booming area now."

(e) "Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers."

(f) "Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona."

(g) "When subdivision takes place, in choice locations such as Lake Mead City, history shows land values rise rapidly."

[3] It was stipulated that: "The promotional and sales technique of naming a subdivision or location, which originally is not in fact an incorporated city or town, a 'city' or 'town' is of common usage as a sales and promotional technique. Examples thereof are: Big Bear City, California; Meteor City, New Mexico; Bermuda City, Arizona; Dinosaur City, Arizona; Salton City, California; Desert City, California; Calico City, California; Horizon City, Texas; Sun City, Arizona; Havasu City, Arizona; Arizona City, Arizona; Toltec, Arizona; California City, California; Sacramento City, Arizona." (Stip. 3, par. F.)

(h) "When development takes place, such as Lake Mead City, history shows that land values rise rapidly."

(i) "Seldom, if ever, will you find it possible to purchase so much good land for such a low price."

(j) "You can be a property owner of land that is considered among the finest ever offered for sale in the State of Arizona."

(k) "The best located resort property in the West."

(l) "Location more than any other factor, determines land values. Lake Mead City enjoys a superb, unique location. Lake Mead City is the only nationally advertised major project of its type, actually starting within the Lake Mead National Recreation Area. Most of the property in this area is Federal Land and is not available at any price. This tends to push prices higher and higher for the choice, privately-owned, deeded properties in Lake Mead City. Get yours now!"

(m) "Most of the region shown on this map consists of Federal land, and is not available at any price. This makes the choice privately-owned, deeded properties in Lake Mead City all the more valuable, and future price increases seem well-assured."

(n) "Land values in the Lake Mead City area have increased over 50% in the last few months, as subdivision has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now, while you can still buy at original subdivider's prices. Watch land values increase as activity heightens."

(o) "Land values in Lake Mead City have increased over 50% in the last few months, as development has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now! Watch land values increase as development continues."

(p) "Thousands of wise investors have already decided that our special offering represents a worthwhile holding, for future profit. Substantial price boosts are indicated as the nationwide demand increases for this choice private property."

(q) "Arizona's best located, best planned resort area, convenient to both year 'round water sports at Lake Mead and the majestic beauty of the Grand Canyon."

(r) "Less than 5 miles from the Lake."

THE UNIVERSITY OF CHICAGO PRESS
CHICAGO, ILL. 60607

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(s) "Lake Mead City actually begins less than 5 miles from the Lake."

(t) "Lake Mead City begins less than 5 miles from the lake."

(u) "Lake Mead City nests in the center of hugh recreational developments. Properties are located within a beautiful Joshua tree forest, and in the heart of the Lake Mead National Recreational Area."

(v) "These estates nest in the center of the West's greatest recreational facilities."

(w) "Here is your once-in-a-lifetime opportunity to become a land owner of estate-size property in the heart of one of the West's largest recreational areas."

(x) "County roads have existed in Lake Mead City for several years, and are maintained by the county."

(y) "County roads have existed in Lake Mead City for several years, and are maintained in proper condition at all times."

(z) "Lake Mead City is easily reached, with access via U. S. Highways and County Roads. An airfield and a boat anchorage are nearby."

(aa) "Modern schools, churches and shopping facilities in nearby Kingman, the county seat, and the largest city in northwest Arizona."

(bb) "All our properties are within the franchised area of Citizen's Utilities Company, with regard to power and telephone." [4]

(cc) "IMPORTANT! Plenty of water." [5]

[4] The full paragraph from which this sentence was taken (Ex. 37, p. 21) reads: "All our properties are within the franchised area of Citizen's Utilities Company, with regard to power and telephone. Easements have already been provided in the County records to guarantee access for utility installation to every parcel. These include water, electricity, gas, and telephone. Power lines have recently been extended along the Pierce Ferry Road, at its western terminus, and we believe that full electric power will be made available to our clients in the reasonable future."

[5] The full text of the brochure statement was contained in Ex. 37, p. 21, and is Appendix "A" hereof.

(dd) "All our units have been surveyed, subdivided, platted and recorded. All road easements are provided to assure you of access."

(ee) "All parcels have been platted and recorded, with road easements laid out to assure you of access";

7. LM's "misleading" and "deceiving" of the public, by means of "photographs and misleading and false statements" within said brochures, and by vicinity maps, into believing that houses already existed on the said Lake Mead City subdivision and that "water for drinking, boating, water-skiing, fishing and swimming sports was abundant" on said subdivision, "which said photographs, statements and vicinity maps" were alleged false in the following respects (Para. 8):

(a) "A photograph of a water pond with the caption 'favorite swimming hole' thereunder, on page 25 of said brochures."

(b) "A picture of a house with the caption 'and comfortable ranchhouse' thereunder, on page 25 of said brochures."

(c) "The statement at the bottom of page 25 of said brochures: 'The above scenes were all photographed within the boundaries of Lake Mead City...a wonderful place to enjoy life.'"

(d) "Six lake scenes appearing on page 29 of said brochures, with the statement thereunder: 'This brochure contains pictures of portions of booming Arizona, including a large group of actual photographs of scenes at Lake Mead City, and the adjoining Lake Mead National Recreation Area, part of which is included within Lake Mead City.'"

(e) "Two photographs of water ponds appearing on page 21 of said brochures, on which page appears the declaration in bold print: 'IMPORTANT! Plenty of water . . .' [6] and the statement on page 24 of said brochures that all pictures on page 21 were actually photographed

within the boundaries of Lake Mead City."

(f) "A photograph showing a lake in the background, appearing on page 9 of said brochures, and the statement appearing below said photograph that 'Lake Mead City begins less than 5 miles from the lake.'"

(g) "A vicinity map of the Lake Mead City area showing thereon two wells, three springs and a water pipe line";

8. Fraudulently representing in plat maps mailed to LM's customers that "special care had been taken to select for them" parcels in the choicest access or choice acres or near the Pierce Ferry Highway (Para. 9);

9. Misrepresenting by special circulars, advertising and price lists mailed to LM's customers that prices of parcels would increase soon "because of the rapidly increasing value in the area, that there were but few remaining lots in choice areas and unless said persons intended to be defrauded purchased lots or parcels or additional lots or parcels immediately, they would never again be able to purchase property in the said Lake Mead City subdivision at the price at which said properties were then being offered," which was allegedly false in that properties in the LM subdivision were not rapidly increasing in value and price increases were arbitrarily made by LM (Para. 10);

10. Concealing certain allegedly material facts as to the parcels offered (Para. 11), to wit:

(a) "The said Lake Mead City subdivision units all are located on odd-numbered sections of land, widely scattered geographically in five different townships, in which townships the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes";

(b) "Many of the said Lake Mead City subdivision

units have rocky hills and unbridged natural drainage washes thereon";

(c) "Only a few of the said Lake Mead City subdivision units are adjacent to existing county-maintained roads and many of said subdivision units are not accessible by ordinary passenger motor vehicle";

(d) "Some of the said Lake Mead City subdivision units are separated from others by a high mountain and deep natural drainage wash";

(e) "The hearest of said Lake Mead City subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38 miles from the nearest existing electric power and telephone lines";

(f) "Most of the said Lake Mead City subdivision units do not have streets for access to lots, street signs, lot corner markers or lot identification markers provided thereon";

(g) "The closest of said Lake Mead City subdivision units is approximately 15 miles and the farthest approximately 40 miles from the nearest place on Lake Mead accessible by existing motor vehicle roads or trails";

(h) "Some of the said Lake Mead City subdivision units are approximately 28 miles distant by existing roads and jeep trails from the only assured source of drinking water located in Section 7, Township 30 North, Range 16 West.

C. The Evidence Presented to the Court

1. Introduction.

This portion of the brief is designed to present to the Court all of the evidence that was presented at the trial, whether by way of the stipulated facts and exhibits or by way of testimonial evidence and exhibits presented at the trial.

(a) The Defendant And His Relationship to LM.

LM was formed in 1960 by an Arizona attorney at the

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DEAR MR. [Name],
I have just received your letter of the 14th inst. and am
glad to hear that you are well. I am sure that you
will find the enclosed of interest.

I am sure that you will find the enclosed of interest
and that it will give you a better understanding of the
subject.

I am sure that you will find the enclosed of interest
and that it will give you a better understanding of the
subject.

I am sure that you will find the enclosed of interest
and that it will give you a better understanding of the
subject.

I am sure that you will find the enclosed of interest
and that it will give you a better understanding of the
subject.

I am sure that you will find the enclosed of interest
and that it will give you a better understanding of the
subject.

Very truly yours,
[Signature]

I am sure that you will find the enclosed of interest
and that it will give you a better understanding of the
subject.

I am sure that you will find the enclosed of interest
and that it will give you a better understanding of the
subject.

request of defendant (Stip. 1, par. 1). Defendant and his family owned all of the stock of LM, and defendant, as president, was actively engaged in the direction of its business (Stip. 1, par.2-6). Defendant was solely responsible for all of its policies and advertising (RT. 370).

(b) LM's Business and Method of Operation

LM conducted its sales of land by mail. Ads were placed by mail via a LM-owned "house agency" in periodicals distributed by mail and LM's customers responded by mail (Stip. 1, par. 10, 13, 15; Stip. 10, par. 35; Ex. 36; RT 363, 364). The sales were for cash or by deferred payments bearing 6% interest on declining principal (Stip. 1, par. 13). Mail and payments from its customers were sent to LM at P. O. Box 13349, Phoenix, Arizona (Stip. 1, par. 12).

An employee of LM, engaged by its lawyer (RT 79), picked up LM's mail at this post office box, placed it in envelopes and mailed it unprocessed to defendant at Azusa, California (RT 79, 80; Ex. 61, 62). In Azusa, the mail was processed by National Land Company (owned by defendant), which had a contract with LM to do this work (RT 363). Return mail and customer payments were transshipped by bus to Phoenix where the same employee picked them up and mailed the return mail from Phoenix and deposited the customers' payments into LM's Phoenix bank account (RT 81, 82, 362, 363; Stip. 1, par. 12). LM operated from the office of its attorney, where its records were kept (RT 359, 360).

(c) LM's Land and Subdivision[7]

LM entered into contracts or options to purchase some 64 full or partial sections of land in Mohave County, Arizona (EX 22, 23), which even the government's "prosecuting witness" (RT 6) conceded is "beautiful" country (RT 407). These sections consisted of the odd-numbered sections in a checkerboard pattern, the even-numbered sections (as with all other Mohave County subdivisions (Ex. 24A)) being owned by the federal government (Ex. 23; Stip. 1, par. 17). They are located roughly 60 miles from rapidly expanding Kingman (RT 459) and reached via any one of three routes: Highway 93 and the Pierce Ferry Highway; the Hill-top route; and the Hackberry route (RT 393-395, 444-445, 286-288). All these roads are county maintained and, since 1958 - with the advent of subdivision activity in the area, at Lake Mohave Ranchos (RT 448, 449, 289, 291), Meadview (RT 296, 297, 454, 455), and Lake Mead City (RT 294, 295) - have been gradually improved (RT 439-447). In addition to these county-maintained roads, there were numerous ranch roads in these sections (RT 443, 260, 261).

Twenty of these 64 sections, after a water and topographic survey (RT 364), were platted and subdivided by the engineers who customarily did this work in Mohave County (RT 317) into some 6800 parcels (Ex. 36). These engineers considered the possibility of subdividing an additional eight sections, but their

[7] Appendix "B" attached hereto is a map that pictorializes LM's holdings, its subdivided sections, the sections from which parcels were offered to the public and the sections in which customer-witnesses had bought parcels.

recommendations to LM, that they not be subdivided because of terrain, were followed (Ex. 54). The engineers were instructed with respect to their subdivision engineering:

"* * * all and only the land within the sections in question (or the pertinent portions being subdivided) that on field inspection was deemed useable was to be subdivided into parcels for sale; that such useable land was to be subdivided into parcels of 1-1/4, 2-1/2, 5 and 10 gross acres (with no parcel to be smaller than 1-1/4 acre), the size of each parcel to be governed as could best be determined by field inspection with regard to the terrain; that each parcel so subdivided was to have at least one reasonable building site; that each 1-1/4 acre parcel was to have roadways on the frontage only; that each 2-1/2 acre parcel was to have roadways on two sides; that each 5 acre parcel was to have roadways on three sides; that each 10 acre parcel was to have roadways on all four sides; that the roadways were to be laid out as symmetrically as possible with regard to the respective parcels and parcel sizes, but with the understanding that some of such roadways, because of terrain, might not be such, under present conditions, as to make actual street or road construction reasonably or economically feasible; and that all lands not so deemed useable were not to be subdivided into parcels for sale but were to be designated and reserved for recreation areas and wildlife refuges, etc." (Ex. 52, 53)[8]

[8] That these instructions were followed is uncontroverted (Ex. 52, 53). Thus, the force of the government's evidence about the mountainous nature of the southeast corner of Unit 17-28-16 (RT 273, 311, 348, 349, 356, 357, 379; Ex. 60, 60A, 60B) was reduced to insignificance when it is remembered that this was an area set aside as a game refuge (Ex. 26). Similarly, the government's evidence about the "big wash" in Unit 7-30-16 (RT 262, 263, 383) was also rendered nugatory, insofar as affording any predicate for a fraud charge is concerned, when it finally became clear that the 50-year (RT 332) rain which had so transformed this section (RT 309, 310, 311) occurred in the fall of 1962 (RT 405, 406), not in 1961 (RT 307, 308). By that time, LM had long ceased selling parcels (RT 367) and, no more than its engineers nor any Tucson subdivider, could not be charged with fraud for having failed to anticipate a 50-year rain. Additionally, while the government proved that parcels were sold from this unit, they failed to prove the sale of a single parcel in the "big wash." The same can be said about all of the government's testimony about washes and terrain in other subdivision units (RT 380-383, 385-392); in no instance did the government prove that LM sold any parcels within the specific area that was described. The engineering evidence that the terrain, as disclosed by field inspections, governed the various parcel sizes (Ex. 52, 53; Cf. Ex. 26) remained untarnished.

While in some instances perhaps difficult or expensive (RT 263, 330, 334), one layman's view was that, except in the northeast corner of Unit 13-30-16^[9], all roads provided for by the engineers could be installed (RT 337).

LM intended to put in the streets shown by the subdivision plats, stake the individual parcels and to install individual parcel markers, but had no intention of providing water, telephone or sewer service for the parcels; nor did it have any plans to build shopping areas (RT 365)^[10].

The subdivision plats for the twenty subdivided sections, together with the LM-improved building restrictions, were recorded with the Mohave County Recorder (Ex. 26, 28; Stip. 1, par. 14). Pursuant to filings with the Arizona Real Estate Department (RT 370), LM offered for sale to the public parcels from eleven of the twenty recorded subdivisions (Ex. 27, 44; RT 361), some of which were physically located within the Lake Mead Recreational area (Ex. 27; Stip. 1, par. 18). These sections contained some 4200 parcels, of which some 3200 became the subject of a sale (Ex. 44).

The nearest of the LM subdivision units were 21 miles from the nearest existing power and telephone lines; were

[9] There was no showing that LM sold any parcels in this portion of this unit.

[10] Had he been called to testify in his own behalf, the appellant could have testified as to the intentions of LM in connection with the construction of streets, the staking of individual parcels, etc.

15 miles by existing roads from the nearest place on Lake Mead accessible by existing roads; and were 4 miles on a straight line from the nearest place on Lake Mead accessible by existing roads. The farthest of the LM subdivision units were 38 miles from the nearest existing power and telephone lines; were 40 miles by existing roads from the nearest place on Lake Mead accessible by existing roads; and were 17 miles on a straight line from the nearest place on Lake Mead accessible by existing roads (Stip. 1, par. 20, 22, 23; RT 393-395). Of the 20 sections which LM subdivided, six were accessible by ordinary passenger car, and of the rest, all but five were accessible by pickup, scout or jeep (RT 376-378, 277-279).

At the time of LM's sales, the only completely developed water source on LM's holdings was the Clearwater or Lucky 7 Well and Tank located in Unit 7-30-16, in which LM had a one-half interest, and which was also the source of water for residents at the nearby Meadview subdivision (Stip. 1, par. 24; RT 298). Other developed water sources on LM's holdings included the Grapevine Well in Section 17-29-16 and the Duncan Springs in Unit 17-28-16, and various earthen cattle tanks (Stip. 1, par. 24). On October 18, 1963, LM completed the successful drilling of a well in the Building Area (Unit 23-29-17) and subsequently installed pumping equipment, a water storage tank, and other accessories (Stip. 1, par. 26). The ground water potential of LM's lands were as stated by its engineers, the full opinion of one of whom was set forth in full in LM's offering brochure (Stip. 1, par. 25; Ex. 37A through F, p. 20; Ex. 49):

"Because I have visited and observed the field conditions of the intermittent water producing streams, springs and dug and drilled water wells on your land holdings together with the surrounding area, I know that the underlying area is a water supply of considerable capacity. Water sources have been developed and used in the past for stock-watering. Recent well drilling has brought in wells from a depth of 60 feet to a maximum depth of 660 feet below the surface. Earthen dams have been used to hold surface waters for stock-watering throughout the year. Conservation of surface waters by proper storage should be noted also. Spreader dams could conserve natural rainfall by storage for better vegetation growth.

"The surface of your lands consists generally of good soil covering granites and related formations. These formations have a tendency to absorb and hold water, thus providing a natural water storage. When penetrated by wells these deeper formations provide a good grade of potable water. The wells, springs and water sources included within the boundaries of your lands or adjacent areas provide water of excellent quality for drinking and domestic use, both from a bacteriological and chemical standpoint, according to reports made on samples.

"It is my belief that different portions of your property will produce water from underground sources. The depth to a good supply of water will vary between 60 and 660 feet below the surface.

"There are springs and a shallow well in the eastern part of your estate on New Water Plateau, which indicates good possibilities for developing a domestic supply.

"There is no question in my mind but that a good supply of water could be collected in what is generally known as the Iron Springs area in the NW part of T.28 N., R. 16W., which could be piped to a great part of your estate, (much by gravity flow) in anticipation of future community development.

"The subject of water on your estate, for the most part, compares favorably with other similar areas in this part of Mohave County, Arizona, and in fact provides water potentialities above the average. Incidentally, Lake Mead, north of your property, is one of the largest storage dams in the world. Its waters are clear and potable, being excellent for domestic use."

(d) Financing Pertaining to LM's Business

LM's purchase price for its holdings ranged \$33.20 to \$125.00 per acre (Stip. 1, par. 19). Its sale price originally was \$395.00 for 1-1/4 acres, subsequently increased to \$495.00 per 1-1/4 acres (RT 361). In the Lake Mead City Building Area (Unit 23-29-17), however, the price was \$695.00 for 1-1/4 acres (RT 369).

The record discloses that as of August 31, 1963, LM had received \$793,837.56 as a result of its sales and had contracts receivable as of that date in the amount of \$729,639.10 (Ex. 44). As of that date LM had expended at least the following sums (Ex. M):

Land Acquisitions	\$263,890.42
Escrow	3,278.10
Engineering & Development	36,552.61
Legal in connection with land acquisition	8,853.23
Tract Office	1,996.43
Model Cabins	5,750.00
Furniture & Fixtures	445.34
Advertising & Printing	79,419.79
Legal & Audit Fees	29,347.78
Stationery & Supplies	6,897.83
Permits & Fees	2,768.78
Telephone & Telegraph	1,859.48
Rent	4,899.00
Insurance	<u>1,844.62</u>
Total	\$447,803.41

As of the same date, LM was indebted on land purchases in the amount of \$607,068.73 and had an estimated liability for required land development in the sum of \$169,687.58 (Ex. L).[11]

(e) LM's Period of Sales and Its Legal Difficulties

LM's holdings, originally owned by the witness Smith (RT 217, 218, 367), were purchased by LM after passing through several hands (RT 367). The Smiths' original sale purported to reserve "range use rights," which led to Mohave County court litigation (RT 218, 222, 223, 367). The Smiths claimed in that litigation that LM, because of the "range use rights" reservation, could not put roads to or in any of its sections nor put up any buildings or fences within sections, nor stake any parcels (RT 224, 225). This contention was sustained by the lower court (Ex. GGG, HHH):[12]

"Defendants are entitled thereunder to the full and exclusive use of the surface of the lands for grazing purposes.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

" * * *

"3. That the reservation of range-use-rights by the defendants is valid and the defendants are entitled thereunder to the full and exclusive use of the lands for grazing purposes.

"4. That the plaintiffs and counter-defendants are barred and forever estopped from having or claiming any right or title to the above described premises

[11] This Reserve for Land Development at one time was as high as \$258,023.25 (Ex. 20).

[12] At trial time, Smith was continuing to insist on his claim. On July 1, 1965, the Arizona appellate court rejected such contention. (1 Az. A 424, 403 P. 2d 828)

adverse to the reservation of the defendants and counter-claimants in and to all range-use-rights, * * *

Subsequently, LM made another deal with the Smiths but that, too, erupted and further litigation ensued (RT 225, 226, 367, 368); whereupon, in 1962, LM quit its selling program (RT 367). The government does not charge that LM's title difficulties, or its litigation relative thereto, has any part in or is a factor in its charge of violation of the mail fraud statute (Stip. 10, par. 36).

(f) LM's Advertising Materials

(1) The Basic Mailings

LM attracted customers by periodical advertisements, all of which were substantially the same. The advertising was introduced into evidence as Ex. 29, and Appendix "C" attached hereto contains a copy of said advertising.

A potential responding customer received a brochure (Ex. 37 Series) and a fact sheet (Ex. 39 Series) (RT 96) and an order form (Ex. 40 Series).

Within the brochure were all of the statements set forth in paragraph 7 of the indictment and all of the pictures and captions set forth in paragraph 8 of the indictment. The fact sheet (almost all of which was incorporated in later versions of the brochure (See p. 27 of the Ex. 37 Series)) reads in part:

"FACT SHEET
FOR THE WISE INVESTOR AT LAKE MEAD CITY

"WE HOPE THAT YOU WILL READ THIS THOROUGHLY SO THAT YOU WILL MORE FULLY APPRECIATE THIS REMARKABLE INVESTMENT OPPORTUNITY IN BEAUTIFUL ARIZONA. WELL-INFORMED CLIENTS ARE OUR BEST ADVERTISEMENT.

"These estates in Lake Mead City are a brand new project.

We believe this to be one of the largest and most ambitious undertakings of its type in the Western United States. It is still new in the sense of being without present city conveniences. This means that for now --- no streets or utilities are available --- otherwise the price of these parcels would be at least ten times more! Even so, there are existing County-maintained roads through Lake Mead City which connect with United States Highway 66, United States Highway 93, and the County seat at Kingman, a short 60 miles away. Las Vegas is also conveniently nearby. We offer good usable land (no swamps here!). All our Units have been surveyed, subdivided, platted and recorded. All have been approved by the County Health Department for use of individual sewage systems, including septic tanks and cesspools (normally included in the price of a home). This is good soil, and we doubt that there will ever be justification for installation of a piped sewage system. All properties have fully met the rigid requirements of the Arizona State Real Estate Department, and all have been approved by the Arizona State Department of Health. These lands are unusually attractive, located within one of the most extensive Joshua tree forests in the world.

"Real Estate experts will tell you that the surest and safest way to profit from buying and selling land is to buy undeveloped property, at a low price, in a good location. We know, that from the standpoint of year-'round climate and recreational facilities, Lake Mead City enjoys one of the choicest locations ever made available, particularly at these surprisingly low prices. Huge profits are made daily in Real Estate, by people who prepare for the future, by buying while prices are low.

"Virtually all the land within several miles of the Lake is owned and maintained by the United States Government, so that we may all use and enjoy this fabulous area. Lake Mead City has some of the closest privately-owned properties ever offered for public sale. The National Park Service operates facilities within the Lake Mead National Recreation Area (Lake Mead City extends right into the Recreation Area). A road maintained by the Government and the County leads directly from Lake Mead City to the Pierce Ferry Boat Anchorage. Remember, most of the land in this area is owned by the United States Government, and is not for sale, at any price. This is one important reason why we believe the choice, privately-owned deeded properties in Lake Mead City will show important price increases in the coming years.

"There are excellent water sources both on and near our property. In this connection, please read Pages 20 and 21 of your color brochure. All photographs shown on Page 21 were taken within the boundaries of Lake Mead City. This is proof of the good water to be found here. As soon as there is enough demand for a public utility water company in this area, we hope to cooperate in the establishment of same. Electric lines are continually being extended along the Pierce Ferry Road and we believe that full electric power will be made available to our clients in the reasonable future. Butane, or bottled gas, is used generally throughout the area."

"There are no assessments, and none are contemplated. Residents will decide themselves regarding asphalt streets, sidewalks, etc. We have a huge amount of work still to do here, and we ask that you bear with us. Rome was not built in a day, and the same for Lake Mead City. Remember that this is a genuine 'ground-floor' opportunity, and properties are now being offered at a fraction of their future potential value.

* * * * *

If the customer responded with an order and down payment, he was sent a vicinity map (Ex. Series 38) on which was marked his subdivision unit (section) and a plat map (Ex. Series 28) showing his individual parcel together with a contract of purchase (Ex. 41).

Every vicinity map (Ex. 38) contained a scale from which any reader could readily translate the mileage of his subdivision unit (and with the plat map the mileage of his individual parcel) from all principal landmarks, i.e., Lake Mead, County maintained roads, and water sources in the area. In the upper left-hand corner of the vicinity map appeared: "most of the property shown on this map is Federal Land . . ."

(2) The Pictures Within the Brochures

All of the brochure pictures described in the indictment were taken in the presence of the company's independent

engineer:

"* * * I have re-reviewed that certain 32-page brochure of Lake Mead Land and Water Co., a copy of which is enclosed. With respect to certain of the pictures therein, I was personally present during the taking of same on a date which was in late 1960. On that occasion I was met by Mr. Jerry Wisotsky and Mr. Max Miller of Imperial Lithographers, Inc. of Phoenix, and Miss Darlene Zaleski and Miss Ruth A. Schalip, Bonanza Airlines hostesses, and took them through the Lake Mead City area and to the lands of Lake Mead Land and Water Co. The following is my best recollection with respect to those pictures.

"The picture at the bottom of page 5 of said brochure was taken by Mr. Wisotsky of Mr. Miller and the two girls on Lake Mead Land and Water Co. property. The pictures on pages 8 and 9 were taken by Mr. Miller and are pictures of the said girl or girls at locations enroute to or near Lake Mead Land and Water Co. lands. The picture at the top of page 21 of myself and one of the girls was taken by Mr. Miller at the Clear Water or Lucky Seven Well owned by Lake Mead Land and Water Co. The picture at the bottom left hand side of page 21 is a picture of the watering tank at the Diamond Bar Ranch headquarters located within the Lake Mead City area. It was taken by Mr. Wisotsky. The picture at the bottom right hand side of page 21 is a picture taken at a cattle watering tank located within the Lake Mead City area. It was taken by Mr. Miller. The picture at the top of page 25 was taken by Mr. Miller and again is a picture of the watering tank at the Diamond Bar Ranch, a watering tank which the ranch foreman's children, to my knowledge, used for swimming. The picture in the middle of page 25 is of the Ranchhouse at the Diamond Bar Ranch headquarters within the Lake Mead City area. It, again, was taken by Mr. Miller. The picture at the bottom of page 25 was taken on one of the properties actually owned by Lake Mead Land and Water Co. The picture in the upper left hand corner and the picture which is in the middle on the right hand side of page 29 were both taken by Mr. Miller on this trip at Lake Mead near Pierce-Ferry. In my opinion, all of those pictures correctly depict the scenes that we saw at those times and places . . . " (Ex. 52)

The Diamond Bar Ranch is within the area of LM holdings and virtually surrounded by LM holdings (Ex. 22, 38). The picture of the "favorite swimming hole" (Ex. Series 37, p. 25) is of a watering tank that was used by the ranch foreman's children

for swimming (Ex. 52)^[13] as it had been previously used by predecessor occupants of the ranch (Ex. H).

(3) The Supplemental Mailings

Subsequently, LM customers were furnished with (Stip. 1, par. 16):

(a) A copy of the May 1962 Arizona Highways magazine (Ex. 40J) which, on pages 14 and 15, contained the map that is set out in Appendix "D" hereof.

(b) A "price increase notification sheet" (Ex. 40K) which read in part:

"IMPORTANT - READ THIS NOW
PRICE INCREASE AT LAKE MEAD CITY, ARIZONA

"Effective November 1, 1961, prices on all unsold properties have been increased from \$100 to \$500. During the past few months, we have sold thousands of acres to thousands of satisfied clients. One of the reasons this is such an outstanding investment opportunity is that these amazingly low prices have not been inflated with man-made improvements. This is unspoiled virgin land, in a beautiful setting." (Underscoring added)

(c) A "newsletter" (Ex. 40L) which contained the following below a map of the area of Mohave County north of Kingman:

"The staff of Lake Mead Land and Water Co. earnestly hope that you will visit Lake Mead City at your first opportunity. However, you will be disappointed unless you realize that this virgin land is presently in its earliest stage of development, and you have indeed gotten in on the ground floor. Our future development plans call for markings of the different Lake Mead City

[13] The ranch foreman denied it was a swimming hole (RT 270, 271) although he admitted that to his own knowledge (with a schedule of 6:00 to night away from the ranch), his children had been in it six times (RT 290, 291).

areas. It is frankly difficult to find your way around right now. Please bear in mind that Rome was not built in a day, and the same for Lake Mead City. Even though you would not now identify your specific property, you would find the entire area abounds with beauty and clean healthful living. We feel that if someone sees the area now, and then returns in a year or two, he will be impressed with the changes.

"We have no offices in Kingman, but we have an information office on the Pierce Ferry Road, and it is open every day. To go by automobile from Kingman or Las Vegas, take U. S. Highway 93. 31 miles Northwest of Kingman (or 73 miles Southeast of Las Vegas), turn onto the Pierce Ferry Road, and continue 30 miles to our Office. Shopping facilities, including gasoline and groceries, have opened a few miles further down the road. For those who would like to stay overnight in their trailer, we have cleared an area adjacent to our Information Office.

Adjoining our Office, we have started construction of miles of roadway for our first developed Building Area. Additional Building Areas will be developed as needed. The first homes are scheduled to be completed shortly. If you decide to build in Lake Mead City, you would be given the opportunity at that time to transfer to a developed Building Area, should you so desire.

"Again, we hope to see you at Lake Mead City soon. Meanwhile, if you would like to order more good property, we suggest you rush your \$10 deposit to us." (Under-scoring added)

(d) A "land investment" sheet (Ex. 40M) which
read in part:

"Choice business property in PALM SPRINGS 90¢ A FRONT FOOT!

"In 1909, Nellie Coffman acquired land along Palm Canyon Drive in the heart of Palm Springs for less than 90¢ a front foot. She erected tents on the property and began providing overnight accommodations for travelers. Today, this same land is part of the site of Palm Springs' famous Desert Inn and is currently valued at \$2,000 a front foot!"

(e) The official Arizona State Highway Department 1962 road map (Ex. 40N) which mapped the northwest part of Arizona and is contained in Appendix "E" hereof.

(g) LM's Exchange Policy

LM maintained an exchange policy whereby a customer who had purchased in any of the ten units to and in which LM had not installed roads or staked lots or installed parcel identification markers, could trade for property in the improved Building Area (Unit 23-29-17) without extra cost, provided that such customer built within five years of the exchange (Stip. 1, par. 32, 33).

(h) LM's Refund Policy and LM's Refund Offer of April 29, 1963

LM had a refund policy whereunder: "If, for any reason" a customer changed his mind or was "not completely satisfied within 30 days, every cent" of his money was "returned without question" (Ex. Series 37, back page).

Additionally, on April 29, 1963, LM mailed to all of its customers a refund offer, with which LM strictly complied, making full refunds to any customer who complied with the terms of it and by granting extensions of time for customers to take advantage of such refund offer where a customer made timely request for such extension (Stip. 1, par. 27, 28). The offer referred to is set forth, in its pertinent parts, in Appendix "F" hereof.

(i) The Testimony of Customer Witnesses

(1) The Testimony of Government Customer Witnesses:

DON REED (RT 84-94; Ex. 13, 63, 64, 65, DD^[14]),

[14] Objection to this exhibit was sustained (RT 94). Defendant submits this was error. The court had previously admitted LM's letter of 11/12/62 (Ex. 65; RT 93) which was in reply to Ex. DD written by Reed's wife on 11/5/62. They read in sequence:

an Oregon newspaper publisher, in January 1962, read an LM coupon ad (See Ex. 36) and, like other LM customers (RT 96), mailed it to LM and received the LM brochure (Ex. Series 37) and fact sheet (Ex. Series 39). On the basis of these documents, he entered into his contract to purchase and made his first \$10.00 down payment, receiving back the Vicinity Map (Ex. Series 38) with his Unit shown and the appropriate plat map (Ex. Series 28) with his parcel shown. After paying \$67.41, Reed quit paying and was terminated (Ex. 65).^[15]

[14 cont'd]

Ex. DD: " * * * It seems time goes by so fast, we have changed our minds & we wish to inform you we no longer want our lot there.

"We are expecting our third child most any time now & Don's job has worked out real well here so we are going to stay here & buy our home.

"We feel this would be no time to move as our eldest child is in school now.

"So our lot & money is yours now. If we have any papers you wish me to return please inform me as I shall be happy to do so.

"We also feel if we should keep our lot & then want to resell it would be to hard as we live so far away.

"We hope there is no hard feelings & we thank you for all your kindness."

Ex. 65: "We understand that you wish to stop making payments on the above-captioned property and you wish to be relieved of any further obligation you have under the Agreement covering that property.

"This letter will serve as a Certificate of Credit in the amount of \$67.41 to be applied towards unsold property of equal or greater value at Lake Mead City, Arizona, any time within 12 months from this date. * * *"

[15] Because the items sent to the various customers and the sequence in which they were sent were essentially the same in all instances, no attempt will be made to set out these items and the sequence for each witness. Suffice to say that the procedure in every case was about the same as in the Reed transaction.

EMILIO D'AMICO (RT 94-99; Ex. 1, 16, 50),
from the Los Angeles area, read all the items that LM sent him
and relied on *all* of these items in making his purchase (RT 97).
He went out to the land in August of 1962. He received the
refund offer (Ex. 50) in May, 1963, but never took advantage
of it (RT 98); nor did he at any time ask for a refund (RT 99).

CLARENCE R. CORLEY (RT 99-106; Ex. 11, 12,
29, 66, 67), a Texas farmer, entered into contracts to purchase
two parcels. On October 12, 1962, he wrote LM:

"I have been unemployed for some time due to a
disability and hence I am considering selling my Lake
Mead property.

"Would you please advise me of the manner in which
this could be handled.

"Thank you." (Ex. 67)

LM replied on October 17, 1962:

"This is pursuant to your recent letter. Our
entire time is taken with the business of subdividing
and developing land. We are not real estate brokers,
and we are not licensed to sell resales on behalf of
others. * * *

* * * * *

"If you absolutely must sell now, perhaps you
should advertise in your own local newspaper. * * *
It is imperative that you keep your account in good
standing, otherwise we would not accept an assignment
of your Agreement to another party. * * * " (Ex. 66)

After this correspondence, Corley did not further communicate with
LM; he had not seen the land in question (RT 106).

WILLIAM R. BLAND (RT 106-112; Ex. 3, 18, 19,
68, 69), a Missouri truck driver, contracted for 5 acres, went up
to see the land but could not find it. He quit paying for the land
because it was not what he thought it would be, but he never asked

or tried to get his money back. He did not finish paying for the land or inform LM that he was not going to pay (RT 109-110).

ANTHONY FELDMAN (RT 112-128; Ex. 70, 71, RR, SS), a San Francisco optician, who contracted for a parcel, visited it in August of 1962. He wrote LM:

"Just to let you know my wife and I took a look at 'Lake Mead City' and vicinity last August. We did not like what we saw. Too much desert to far from civilization, it will be many years befor it becomes a 'city' I'm afraid we will not live that long to see it. Best you give it back to the 'Indians'. We do not put all the blame on you, we are also to blame, because we now relize it is all ways best to see what you buy. We did not. It was your beautiful 'Brochure' that did the trick. Seeing the land is a different story.

"To make a long story short - we now have no desire to own property at so called 'Lake Mead City.' We shall make no more payments - Please dispose this property for us if you can, or what you think best." (Ex. 71)

LM replied with a certificate of credit (Ex. 70), which Feldman signed and returned (Ex. RR).

"We understand that you wish to stop making payments on the above-captioned property and you wish to be relieved of any further obligation you have under the Agreement covering that property.

"This letter will serve as a Certificate of Credit in the amount of \$323.49 to be applied towards unsold property of equal or greater value at Lake Mead City, Arizona, any time within 12 months from this date. * * *

* * * * *

"Please sign your acceptance on the original of this letter, then send it to us, together with your Sales Agreements and payment book. * * * " (Ex. 70)

Subsequently, on April 6, 1963, LM wrote him:

"We have received information from the Lake Mead City Information Office, that you or your representative visited Lake Mead City, prior to the termination of your account. You never reported any dissatisfaction to us, but we wonder if you were displeased with the location

of your property.[16]

"It is our sincere wish to count you among our many satisfied customers. We would be willing to furnish property in Lake Mead City Unit No. 23-29-17. This is our Building Area, and construction of owner-built homes is just now getting underway. Our Lake Mead City Information Office is also located in this Unit. All roads and stakes have been installed. Maps of the area are enclosed.

"Prices in this Unit are higher than the price of the property you were buying, but we would make the same amount of residential property available at the same low price you were paying. You would also receive full credit for your forfeited equity in your previous purchase.

"We hope you will accept this offer. If you like, you may first visit Lake Mead City at your convenience, and make your own selection of choice property."

Feldman did not respond (RT 127) and never requested a refund (RT 113). The court did not permit defense counsel to examine the witness concerning his purchase of two parcels of land in Lake Mojave Ranchos about the same time as the LM transaction (RT 115-123).

JOSEPH H. RODLER (RT 128-146; Ex. 4, 72, 73, 74, 75, 76, 77, VV, WW), a Missouri bank guard, wrote LM on January 23, 1963, that he was planning to visit the property (Ex. 75), and LM sent him information (Ex. 73). He was directed to his section (RT 132) over a rock and sand road (RT 134), and there being no stakes, he could not find his parcel (RT 134). On his return to Missouri, Rodler quit paying and requested a refund. LM responded on April 12, 1963:

"Thank you for writing us in regard to your dissatisfaction with your investment in undeveloped property.

"It is our sincere wish to count you among our many satisfied customers. We would be willing to furnish

[16] LM was mistaken as to this statement. LM, in sending this form letter, unquestionably overlooked Feldman's earlier letter (Ex. 71).

property in Lake Mead City Unit No. 23-29-17. This is our Building Area, and construction of owner-built homes is just now getting underway. Our Lake Mead City Information Office is also located in this Unit. All roads and stakes have been installed. Maps of the area are enclosed.

"Prices in this Unit are normally higher than the price of the property you were buying, but we would make the same amount of residential property available at the same low price you were paying. You would also receive full credit for your forfeited equity in your previous purchase.

"We hope you will accept this offer. If you like, you may first visit Lake Mead City at your convenience, and make your own selection of choice property.

"If you prefer, please feel free to now return your Sales Agreements and payment book for full refund. We very much want to count you among our many customers, but most of all we want you to be happy." (Ex. VV)

LM subsequently refunded Rodler in full (Ex. WW; RT 130).

ANN BENDER (RT 146-159; Ex. 5, 78, 79, 80, 81, 82) is a Riverside, California, customer. In early 1962, she went down to see the land (RT 151, 155, 156). On March 29, 1962, she wrote LM advising that she had heard "an injunction had been filed against" LM for lack of payments and that she was withholding further payments until advised (Ex. 80). LM responded, assuring that she would get good title (Ex. 79). She continued making payments (RT 156). Then on January 28, 1963, she wrote LM:

"I am writing this letter because I am quite concerned about my property at Lake Mead. There was an article in our paper last week which led me to believe that I am being swindled, and since then I have received a request from the Postal Authorities in Pueblo Colorado for all information I have about the property, also any advertising. I have a payment due now, but under the circumstances, I believe it would be wise to wait until I hear from you as to what this is all about.

"I shall be looking for an immediate & favorable reply." (Ex. 80)

On February 5, 1963, LM responded:

"Thank you for your nice letter of January 28, 1963.

We believe the enclosed printed item will answer your inquiry.

"We appreciate your understandable anxiety, and we have posted a note to your account, granting a fifteen (15) day extension on your payment due January 29, 1963." (Ex. 80)

Later, in May, 1963, she received the company's refund offer (RT 151). After that she continued her payments until she came to Phoenix in July, 1963 (RT 156, 157). She never asked for a refund, because "I didn't figure I'd get it, I guess." (RT 153)

ROBERT M. BALL (RT 161-174; Ex. 6, 83, 84, 85, 86, 87, YY) resided in Tucson and was a member of the U. S. Air Force. He contracted to purchase two parcels. He received the refund letter of April, 1963 (Ex. 50; RT 169) and, pursuant to its terms, visited the property (RT 170) and, almost three years after his purchase, had his money refunded in full (RT 170). Prior to the refund offer, he had received and returned to LM a questionnaire in which he said:

"I am satisfied with my investment in undeveloped property in the Lake Mead City subdivision. [x]

* * * * *

"Have you visited the Lake Mead City subdivision?
Yes [x] No [] If yes, when did you visit,
and what were your impressions?

"July 1961 - We found the subdivision to be as we
had imagined." (Ex. YY)

The defendant's objections to government's exhibits 41 and 42 were overruled (RT 167-168).

JOHN R. BEAN (RT 175-181; Ex. 14, 88, ZZ, ZZ-1, ZZ-2), an insurance engineer from Pittsburgh, Pennsylvania, had never been in Mohave County. He contracted to purchase a

parcel, paid \$120.00 and then on March 22, 1963, wrote LM:

"Due to adverse publications in recent newspapers about land swindles in Arizona, I was wondering about the piece of property I am purchasing from you.

"I wrote to the Arizona Real Estate Department inquiring about your development and the answer is as quoted, 'Lake Mead Land and Water Company is at present engaged in considerable litigation and is having difficulty in its attempt to force Stewart Title Company to deliver deeds. This department has taken the position that Lake Mead Land & Water Company should not be permitted to advertise or sell sub-division lots until the matter is cleared up'.

"I also received a questionnaire from the United States Postmaster of Pueblo, Colorado asking me to send all documents pertaining to the parcel of land I am purchasing. There also was a questionnaire as to my impression of what I was purchasing, whether there were streets, water, electricity on the premises; distance of nearest cities and towns; what was promised in the future pertaining to the paving of streets, and the improving of property, etc.

"With all this in mind I find myself thinking that I have been (in plain English) 'rooked'. I would greatly appreciate it if I could be brought up to date on the development and would like to have the answers to the following questions.

"Is this land out in the desert? Undeveloped?

"Is this development laid out in lots with roadways passing in front of each lot that are improved or paved?

"What is the water situation?

"Is water to be piped to this sub-division in the near future or is there water that can be obtained from a water company?

"Could I move there at the present time?

"Would electricity be available to me immediately?

"What expense would I have to go through to have it brought to my premises?

"What is the distance from my lot to the nearest paved road?

"The distance from my lot to the nearest town?

"The distance to Lake Mead from my lot?

"How many people have actually built on the property and are currently residing?

"I would also like to have some references such as banks, etc. to whom I may correspond.

"I personally think that if there are not roadways to each and every lot and if electricity is not immediately available then this is nothing but open and barren land and it has been misrepresented to me.

"For the sum of money I am paying you, including the interest, I can purchase the equivalent amount of land on a paved street four miles from a town with a population of eight thousand people, having gas, water, and electricity.

"I am not in a position to go and inspect this land and fully depended upon the impression you gave me in your literature. If it is true what the real estate commission tells me, that there is litigation and titles and deeds cannot be delivered, then I am requesting you refund the money I have put into your venture." (Ex. 88)

LM responded on March 30, 1963:

"The property you purchased is undeveloped, and this is clearly stated in the color brochure you received before you purchased. However, we do not want you as an unhappy customer, and we therefore ask that you now return all your Sales Agreements and your payment book for full refund.

"You state in your letter that you can purchase 1-1/4 acres of good land on a paved street, with all utilities and near a town of 8,000 people, all for the same price of \$495. We don't dispute your statement, but we sincerely doubt that this could be done within hundreds of miles of our subdivision property. Certainly there is cheaper land, in other areas that have a less desirable climate and potential." (Ex. ZZ)

LM then refunded Bean's money in full (Ex. ZZ-1; RT 181).

CHESTER W. BINKLEY (RT 182-206; Ex. 8, 89, 90, 91, 92, 93, 50, 94, AAA, BBB, CCC, DDD), a Kansas railroad maintenance track foreman, contracted for three parcels. On October 27, 1961, LM, in response to Binkley's request for a 2-1/2 acre parcel wrote him in part:

"* * * One of the reasons this is such an outstanding investment opportunity is that these amazingly low prices have not been inflated with man-made improvements. This is true virgin land, in a beautiful setting.

* * * * *

"Please read the enclosed Fact Sheet for additional information." (Ex. 90)

This witness did not complete making payments on the land (RT 185).

He made one trip to the property (RT 193), which was in September, 1962 (RT 195). He testified that concerning the property:

"I couldn't see it. That lady at the office building where I had driven to advised me not to try to go to the land as we had two small children with us and we were in a hurry and I took her advice and left.

"She said she didn't think it would be advisable to go down, it was so hot and sandy. She did show me on the map that it was approximately seven miles from this place of their office building there to where we had purchased this property." (RT 186)

Later, on March 4, 1963, Binkley wrote LM:

"The two delayed payments are inclosed.

"We were holding up the payments due to the postal department calling for all our papers due to the transaction of the lots we are paying on; and due to some of the questions being asked, and some of the warnings we see in the papers we are wondering if we had made a mistake.

"We were as far to the property as your field office, and were informed there wasn't any streets to the property we are paying on; fact no water close to these lots.

"I would like to know how many people live in Mead City.

"How far is a road to the lots we are buying?

"Do all mineral rights stay with the title of these lots we are buying?

"Are you able to tell how deep a person would have to drill for water?

"Is the Pierce Ferry road going to be the main traveled road to the Lake Mead or is the street or road you have layed out for industrial development going to be on the main road to the lake?

"I am sorry we did not go on to look this place over, but not having time while we were at your field office we turned back; so this is the reason I am asking these questions." (Ex. AAA)

On March 12, 1963, LM responded:

"Thank you for your nice letter of March 4, 1963. We find that on October 21, 1961 you wrote us a letter which asked very much the same questions. We sent a lengthy answer together with a fact sheet on October 27, 1961, and you purchased in November of 1961.

"At the present time there are two permanent resi-

dents on our subdivision property. It is premature to expect much construction at this early stage, because most people have not yet had enough time to pay for their land. However, several buyers are right now clearing their land, and have informed us they will build this summer.

"A ranch road, suitable for four wheel drive vehicles, passes through Unit 19-30-16, almost midway between your two locations. This road is approximately one-quarter mile from your properties.

"As outlined in the material we sent you before your purchase, mineral rights throughout our large area are owned by the Santa Fe Railroad Company. Expert opinion holds that the true wealth in this location is not the minerals below the ground, but the excellent climate and scenery above the ground. We would frankly doubt that there are minerals of any value beneath these lands.

"Clearwater Well is 1-1/2 miles north of your property, as shown on your Vicinity Map. This well has good water at a depth of less than 150 feet. This should serve as a rough guide to you, in estimating the depth to water in your location. However, no one could tell in advance of drilling just exactly how far down the water is in any location.

* * * * * (Ex. 91)

Subsequently, he received the company's questionnaire (Ex. 94), which he refused to make out (RT 189, 190), and later he received the refund offer of April 29, 1963 (Ex. 50; RT 190). Thereafter, and until July 2, 1963, he continued to make payments (Ex. CCC, DDD) but at no time sought to comply with the terms of the refund offer (RT 203) even though he went to Phoenix in July, 1963 (RT 203). He stopped making payments only when he came to testify before the Grand Jury (RT 204). Later, he *wrote* for a refund and received this reply from LM:

"Thank you for your recent letter. We regret that because of a heavy workload, we were unable to reply sooner. Our records show that you received a detailed Fact Sheet before your order was accepted. This Fact Sheet clearly set forth the virgin, undeveloped nature of Lake Mead City properties. Thereafter, you completed your purchase for such undeveloped property.

"Since you first contacted this company, we have repeatedly emphasized the undeveloped nature of the

property you are buying. As an example, we refer you to letters we sent you on October 27, 1961, December 6, 1961, January 4, 1963, March 12, 1963 and April 29, 1963.

"As you indicated in your letter, you both visited Lake Mead City in September, 1962, which is almost one year ago. You did not write us one adverse comment after your visit, and you continued your payments on both purchases without complaints of any type.

"There is nothing in your file that would indicate any justification for a refund. Yours has always been an honored account, and we hope you will see fit to continue with your investment." (Ex. 92)

FRANK A. LEONARD (RT 206-213; Ex. 7, 95, 50, EEE, 96,FFF) was a retired Colorado rancher who had never seen the land. Just prior to trial time he had finished paying for his parcel (RT 208, 209). He received the refund offer of April 29, 1963 (RT 211) but never took advantage of it although he was in Phoenix in July of 1963. His sole complaint to the LM (RT 212) was embodied in his wife's letter of July 8, 1963:

"My husband, Frank A. Leonard, has been subpoenaed - to appear at a Grand Jury Hearing - next Monday July 15th at Phoenix, Arizona - concerning you & your Company. Fraud? Or what is it? We had faith that your Company would not be found to be crooked. But we must have been wrong all the way. To keep our account with you in record standing - here is another check for Ten Dollars (\$10.00). If all is not okay with you folks - we want all of our money back - by return mail. So far we will have paid you folks - the sum of Two - Hundred and Thirty dollars (with this check of Ten dollars included): \$230.00 on our Land Purchase. -

"Please return our money promptly - so we won't have to employ a lawyer to collect - with his fees added." (Ex. EEE)

LM responded to this letter as follows:

"* * * Our records show that you received a detailed Fact Sheet before you ever mailed any money to this company. This Fact Sheet clearly set forth the virgin, undeveloped nature of Lake Mead City properties. Thereafter, you placed your order for such undeveloped property.

"Since that time, we have repeatedly emphasized the undeveloped nature of the property you are buying. As

an example, we refer you to the letters we sent you on November 9, 1961, February 17, 1962, January 8, 1963, and April 29, 1963.

"There is nothing in your file that would indicate any justification for a refund. Yours has always been an honored account, and we hope you will see fit to continue with your investment." (Ex. 95)

HARRY E. OLDFIELD (RT 226-235; Ex. 7, 97, 98, 99, 100, 101, 102, III), a retired Pittsburgh automobile mechanic, contracted in March of 1962, made eight payments, and stopped paying. He was near the property en route to Las Vegas on Highway 93 in 1963; he never asked for a refund. On July 31, 1962, he wrote LM:

"I have contacted all my children, and they have informed me, they don't care about property in the west, in which I bought or am buying it for them.

"So at my age nearing 65 I own my property here and don't intend to leave. So if some one wants to have my lot they can at no extra cost to them.

"If you find a buyer let me know and I will sign the necessary papers." (Ex. 101)

LM replied:

"This is pursuant to your recent letter. Our entire time is taken with the business of subdividing and developing land. We are not real estate brokers, and we are not licensed to sell resales on behalf of others.

* * * * *

"If you absolutely must sell now, perhaps you should advertise in your own local newspaper. * * *" (Ex. 100)

Subsequently, on January 3, 1963, Oldfield wrote again:

"I do not think you have done the right thing in putting my property in the hands of a small loan company, I am paying about 36% interest instead of the 6% you have in your yellow paper agreement.

"Line (1) 'one' says I pay 6% per year on the unpaid balance.

"So I do not intend to pay that high interest, So I guess I am stuck for my money, hope you get rich real quick, but on some other sucker, like me.

"Thanks for your honesty.

" * * *

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"P.S. If I knew your Better business Bureau, I would write & see who is right or wrong. Maybe our Government can do something."

LM replied:

"* * * First of all, we have not put your account in the hands of a small loan company. We handle all accounts ourselves. You deal with only one company, throughout your transaction. We own the land, we subdivided the land, we sell the parcels, and we collect all the payments. After payment in full, we issue the Deed.

"Your interest has always been strictly computed at the rate of 6% per year, which is 1/2% per month on the reducing unpaid balance. * * *

"We would be grateful if you would take your payment book to an attorney, or to your local bank. Ask them if we have charged you too much interest, or if we only charged you 6% as promised. If any banker says we charged over 6% interest, have him write us a letter and we will refund all your money. * * *" (Ex. 102)

FLORENCE JOHNSTON (RT 235-241A; Ex. 103, 103A,

103B) was a non-customer witness from Oxnard, California, who, in October of 1962, went to look at the property before she made a purchase. She claimed she could not get up the Pierce Ferry road beyond 11 miles (RT 238-241). She did not see the Lake Mohave Ranchos project (RT 241A).

ANDY K. MECCHI (RT 241A-247A; Ex. 104, 2, 15, 17, 105, 50) is a California refrigeration installation man, whose land went to his wife in a divorce settlement. He had completed making his payments (RT 244-245). He never went to see the land (RT 245-246). He received both LM's questionnaire and refund offer (Ex. 50), and although he was in Phoenix in July of 1963 (RT 247), he did not go up to the property to take advantage of the refund offer (RT 247).

(2) The Testimony of Defendant's Customer Witnesses:

COL. LYMAN P. DAVIDSON (RT 421-438), a retired Air Force (OSI) Colonel, bought and paid for his parcel and received a deed. He received the refund offer of April 29, 1963 (RT 423, 424). He visited the land in 1961 and in mid-1963 (RT 424). He paid \$395 for his parcel and at trial time believed it was worth \$595 and would maintain this estimate of value even if he was wrong as to where water was located (RT 433). He believes his land to be very beautiful (RT 427-428).

MRS. JACK HUMMEL (RT 496-518; Ex. 6D-60), with her husband, lives at Lake Mead City in the Building Area, having bought the Haines home, for cash, in April of 1965 (RT 496, 497). The price, for cash, was the precise amount Haines had invested in the house and land (RT 499). Subsequent to their purchase, they sold one-half of their parcel (the undeveloped half of their 1-1/4 acres) for \$355 cash. She described how her city-like home is serviced by butane and a diesel plant (RT 503). The altitude and climate were good for her husband's heart condition. Again, the defense was not permitted to examine the witness concerning Lake Mohave Ranchos (RT 504-505).

HOWARD P. SWEENEY (RT 547-556; Ex. 6S), an Everett, Washington, police captain, purchased in 1961 after viewing the property. (RT 548). He visited the land in early 1961 and again in April of 1963 (RT 549). He traded into the Building Area parcel at an additional cost of \$300 (RT 551), because he knew the unit in which his original purchase was located would not

be developed very soon (RT 550). The witness testified as to certain improvements which had been made in the area subsequent to his purchase (RT 553).

BETTY RUSSELL (RT 556-563; Ex. 6T), a Pasadena legal secretary and former police reporter, visited the property in 1961 (RT 556). In 1964, she traded, in order to be able to build immediately (RT 558), for property located in the Building Area. She traded for two parcels at \$695 each (RT 558-560); those parcels were worth \$1,000 each at the time of trial (RT 563). She talked her sister into buying a parcel, because she liked her land very much (RT 558-559).

THOMAS LINCOLN (RT 576-581), an Illinois accountant, bought a parcel in 1961 for \$495 (RT 576-577) and visited the land three times: in December of 1961, July of 1962, and February of 1963 (RT 578). He bought a second parcel after his second visit, for \$595 (RT 577). He would not sell his parcels for what he paid for them (RT 579).

ETTA MITCHELL (RT 582-607; Ex. 7F-7J) is the wife of a retired Marine Master Sergeant, who became LM's on-site manager in June, 1964 (RT 582). They bought a parcel in 1961 (RT 583) and, after visiting in June of 1963, traded it against two of the more expensive parcels in the Building Area, where they were building their home as of the time of trial (RT 585). The witness obtains her water from a storage tank at the well. The residents of Lake Mohave Ranchos and Meadow View subdivisions do not have piped water either; the people residing at both of these subdivisions obtain their water by hauling it (RT 594-596).

OTIS R. McDONALD (RT 607-610), a Washington mining engineer, purchased two parcels for \$1,000 in 1961 and visited the land in 1962. He paid for his parcels in full (RT 609).

DELMER J. MEYER (RT 615-618), a Post Office foreman of mails at La Habra, California, visited the Building Area in September of 1963 and bought a commercial parcel for \$1,395, which is now worth \$2,500. He saw his property before he purchased it. He was, at time of trial, making payments on his property.

(3) The Location of Parcels Purchased By
Customer Witnesses:

Appendix "B" hereto illustrates the section of property owned by LM in Mohave County, Arizona. Appendix "G" sets forth the description and location of parcels purchased by both government and defense witnesses. Appendix "G" also contains information regarding the individual purchases.

STATUTE INVOLVED

Title 18, U.S.C., Sec. 1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, Sec. 34, 63 Stat. 94."

SPECIFICATION OF ERROR

- I. THE EVIDENCE PROCURED BY THE GOVERNMENT AND INTRODUCED INTO EVIDENCE WAS ILLEGAL, IN THAT:
 - A. It Was The Product Of An Illegal "Mail Watch," In Violation of Amendments IV and IX, United States Constitution.
- II. APPELLANT'S MOTION TO DISMISS INDICTMENT OR, ALTERNATIVELY, MOTION FOR DISCLOSE OF MINUTES OF GRAND JURY AND MOTION TO DISMISS INDICTMENT ON THE BASIS OF DISCLOSURE SHOULD HAVE BEEN GRANTED (CT 30-35).

III. THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT, ON THE

FOLLOWING GROUNDS, SHOULD HAVE BEEN GRANTED:

- A. The Indictment Failed to State an Offense Against
The United States.
- B. The Great Bulk of Allegedly Fraudulent Statements
Attributed To The Appellant In The Indictment
Were No More Than "Seller's Talk" or "Puffing,"
Which Is Not Violative of 18 U.S.C. Sec. 1341.
- C. The Concealments Or Omissions In Advertising Attributed To The Appellant Were Not Criminal Under
18 U.S.C. Sec. 1341, Especially Since The Appellant Was Charged, In Some Instances, With Merely
Not "Clearly Revealing" Certain Facts.
- D. There Were No Allegations In The Indictment That
Someone Was Defrauded.
- E. Inadequate Evidence Was Presented To The Grand Jury
To Sustain An Indictment.
- F. If The Indictment Stated An Offense Under 18 U.S.C.A.
1341, then 18 U.S.C.A. 1341 And The Indictment
Returned Against Appellant Were Unconstitutional
As Not Providing Any Ascertainable Standard
Of Guilt.

IV. APPELLANT'S MOTION TO DISMISS INDICTMENT, ON THE GROUND EACH
COUNT FAILED TO STATE AN OFFENSE AGAINST THE UNITED STATES
AND EACH COUNT WAS DUPLICITOUS, SHOULD HAVE BEEN GRANTED
ON THE FOLLOWING GROUNDS:

A. Each Count Failed To State Facts Sufficient To Con-
stitute An Offense Against The United States.

B. Each Count Of The Indictment Was Duplicitous.

V. THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING THE FOLLOWING
PRETRIAL MOTIONS MADE BY THE APPELLANT:

A. Motion For Discovery And Inspection Of Documents

(CT 59, *et seq.*).

B. Motion For Bill Of Particulars (CT 76, *et seq.*).

VI. THE INDICTMENT IN WHICH THE APPELLANT WAS CHARGED WAS INVALID
AND VOID, IN THAT IT CHARGED CONDUCT WHICH WAS PROTECTED
BY THE FIRST AMENDMENT, UNITED STATES CONSTITUTION.

VII. THE COURT COMMITTED PREJUDICIAL ERROR IN MISINTERPRETING AND
NOT AFFORDING TO THE APPELLANT THE PROTECTION OF THE
FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN
THAT:

A. The Evidence Was Insufficient As A Matter Of Law

To Overcome The Presumption Of Innocence Which
Surrounds A Defendant In Every Criminal Proceeding.

B. No Specific Wrongful Intent Was Present As Is Required

By 18 U.S.C. Sec. 1341 and Which Intent Can Never
Be Presumed.

C. The Undeniable Good Faith Exhibited By The Appellant

Was A Complete Defense To A Charge Of Violating
18 U.S.C. Sec. 1341.

D. Appellant Was Found Guilty Under An Indictment And

Statute Which Did Not Contain Any Ascertainable
Standard Of Guilt.

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JAMES H. HARRIS, DECEASED

APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

FILED FOR RECORD IN THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

ON THE 10TH DAY OF JANUARY, 1911

IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

DO HEREBY CERTIFY THAT THE FOLLOWING IS A TRUE AND CORRECT

TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE ENTITLED CASE

AND THAT THE SAME IS IN ACCORDANCE WITH THE RECORD AS FURNISHED

BY THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

AND THAT THE SAME IS IN ACCORDANCE WITH THE RECORD AS FURNISHED

BY THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

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IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

E. The Government Failed To Prove Anyone Was Defrauded

By The Appellant's Alleged Misconduct.

VIII. THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AND REFUSING TO ADMIT THE FOLLOWING EVIDENCE:

A. Evidence Of Value.

B. Evidence Of Standards Of The Industry And Related Values.

C. Opinion Evidence.

D. Other Errors And Excluding Evidence.

IX. DEFENDANT'S CONVICTION MUST BE REVERSED FOR THE REASON THAT HE WAS DEPRIVED OF EFFECTIVE REPRESENTATION OF COUNSEL, IN VIOLATION OF AMENDMENT VI, UNITED STATES CONSTITUTION.

OUTLINE OF APPELLANT'S ARGUMENT AND PRELIMINARY CASE AUTHORITY

I

THE EVIDENCE PROCURED BY THE GOVERNMENT AND INTRODUCED INTO EVIDENCE WAS ILLEGAL, IN THAT:

A. It Was The Product Of An Illegal "Mail Watch," In Violation of Amendments IV and IX, United States Constitution.

1. Introductory Statement. This issue was raised by the appellant in a pretrial motion to suppress evidence (CT 72-74), supported by defense counsel's affidavit (CT 85, 88-89). Although the record is not clear, it appears (a) allegations in appellant's affidavit were not refuted by the government, and (b) it is appellant's recollection that the "mail watch" was admitted by the government during the course of the proceedings herein. This

latter statement is made on information and belief, since there is apparently no transcript of these proceedings.

2. Preliminary Case Authority. A "mail watch" is a violation of the Fourth Amendment (search and seizure) and the Ninth Amendment (right to privacy) to the United States Constitution. *Weeks v. United States*, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652; *Boyd v. United States*, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *In the Matter of Jackson*, 96 U.S. 727, 24 L. Ed. 877, 23 Wallace 877 (first-class mail entitled to protection under the right to privacy); *Oliver v. United States*, 239 F. 2d 818; and *Griswold v. Connecticut*, 381 U.S. 479, 85 Sup. Ct. 1678, 14 L. Ed. 2d 510; and is a violation of the United States Statutes and Post Office regulations - 18 U.S.C. Sec. 1703; 39 C.F.R., subchapter A-1, part 3 (regulations Post Office Department).

II

APPELLANT'S MOTION TO DISMISS INDICTMENT OR, ALTERNATIVELY,
MOTION FOR DISCLOSE OF MINUTES OF GRAND JURY AND
MOTION TO DISMISS INDICTMENT ON THE BASIS OF DISCLOSURE
SHOULD HAVE BEEN GRANTED (CT 30-35).

1. Introductory Comment. Prior to trial, the appellant moved to dismiss the indictment or, alternatively, for disclosure of the Minutes of the Grand Jury. This motion was supported by affidavit of defense counsel (CT 33-35) based upon information obtained from the public records in the office of the United States District Court Clerk or advice from government witnesses. Since appellant was not seeking the names of Grand Jurors, or of the

manner in which each Grand Juror voted, but was only questioning the action of the Grand Jury taken as a body, appellant's motion should have been granted. This is especially so since defense counsel's affidavit seriously questioned the validity of the Grand Jury's action in indicting the appellant.

2. Preliminary Case Authority. *Abbott v. Superior Court of Pima County*, 86 Ariz. 309, 345 P. 2d 776; *United States v. Thompson*, 144 F. 2d 604, Cert. denied, 323 U.S. 790, 65 Sup. Ct. 313, 89 L. Ed. 630. Compare: *United States v. Armour*, 214 F. Supp. 123.

III

THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT, ON THE FOLLOWING GROUNDS, SHOULD HAVE BEEN GRANTED:

A. The Indictment Failed To State An Offense Against The United States.

1. Introductory Comment. The indictment was defective as a matter of law, in that:

(a) It did not contain the elements of the offense intended to be charged.

(b) It did not sufficiently apprise the appellant of what he had to be prepared to meet.

(c) It was not sufficiently definitive in its terms to pinpoint with accuracy the extent to which a defendant may plead a formal acquittal of conviction.

(d) It did not set out the offense with sufficient specificity as to inform the court of the facts alleged, so that

it might decide whether they are sufficient in law to support a conviction.

2. Preliminary Case Authority. *Russell v. United States*, 369 U.S. 749, 82 Sup. Ct. 1038, 8 L. Ed. 2d 240.

B. The Great Bulk Of Allegedly Fraudulent Statements Attributed To The Appellant In The Indictment Were No More Than "Seller's Talk" or "Puffing," Which Is Not Violative of 18 U.S.C. Sec. 1341.

1. Preliminary Case Authority. *Harrison v. United States*, 200 F. 2d 662; *United States v. Rabinowitz*, 327 F. 2d 62.

C. The Concealments Or Omissions In Advertising Attributed To The Appellant Were Not Criminal Under 18 U.S.C. Sec. 1341, Especially Since The Appellant Was Charged, In Some Instances, With Merely Not "Clearly Revealing" Certain Facts.

1. Preliminary Case Authority. *United States v. Kram*, 247 F. 2d 830; *United States v. McNamara*, 91 F. 2d 986; *Epstein v. United States*, 174 F. 2d 754; *Stubbs v. United States*, 249 Fed. 571; *Charles v. United States*, 213 Fed. 707; *Williams v. United States*, 278 F. 2d 535; *Haid v. United States*, 157 F. 2d 630; *Gregory v. United States*, 253 F. 2d 104; *Kreuter v. United States*, 218 F. 2d 532; *Linden v. United States*, 254 F. 2d 560; *Silverman v. United States*, 213 F. 2d 405; *Cacy v. United States*, 298 F. 2d 227.

D. There Were No Allegations In The Indictment
That Someone Was Defrauded.

1. Preliminary Case Authority. *Fushay v. United States*, 68 F. 2d 205; *United States v. Brown*, 79 F. 2d 321; *United States v. Rabinowitz, supra*, 327 F. 2d 62; *United States v. Barren*, 305 F. 2d 527; *United States v. Brunet*, 227 F. Supp. 766; *Moser v. New York Life Insurance Company*, 151 F. 2d 396; *Schlaadt v. Zimmerman*, 206 F. 2d 282; *Kern Copters, Inc. v. Allied Helicopter Service, Inc.*, 277 F. 2d 308.

E. Inadequate Evidence Was Presented To The
Grand Jury To Sustain An Indictment.

1. Introductory Comment. A bona fide promise, which was present in the instant case (Exhibit F) and presented to the Grand Jury, to return money obtained as a result of the alleged misleading advertising was made by LM and negated any charge of fraud which the false advertising would otherwise have supported.

2. Preliminary Case Authority. *Harrison v. United States, supra*, 200 F. 2d 662; *Jeffries v. Olesen*, 121 F. Supp. 463. And good faith is a complete defense to a mail fraud indictment. *Gold v. United States*, 36 F. 2d 16; *Walters v. United States*, 256 F. 2d 840.

F. If The Indictment Stated An Offense Under 18 U.S.C.A. 1341, then 18 U.S.C.A. 1341 And The Indictment Returned Against The Appellant Were Unconstitutional As Not Providing Any Ascertainable Standard Of Guilt.

1. Introductory Comment. If, as a matter of law, the indictment returned against the appellant stated an offense under 18 U.S.C.A.

Sec. 1341 and a "scheme to defraud" could be found to be present without there having been proved any "actual misrepresentation of fact," that the scheme "succeeded" or that anyone was defrauded or sustained a loss as a result of the scheme, then the indictment provided no ascertainable standard of guilt. This is all the more true when it is considered that the court merely accepted that what was *not* said by the appellant constituted "concealment" or that most gullible persons would misread what was contained in the material promulgated by the appellant and his company.[17]

2. Preliminary Case Authority. *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 Sup. Ct. 518, 15 L. Ed. 2d 447; *Winters v. United States*, 333 U.S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840; *Musser v. Utah*, 333 U.S. 95, 68 Sup. Ct. 397, 92 L. Ed. 562; *Connally v. General Construction Co.*, 269 U.S. 385, 46 Sup. Ct. 126, 70 L. Ed. 322; *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516; *United States v. DeCadena*, 105 F. Supp. 202.

[17] At and prior to the time of the indictment returned against the appellant, extensive congressional hearings were in progress and the Post Office Department pointed with considerable pride to the indictment of the defendant in connection with the Lake Mead project. The publicity that attended the indictment of the defendant can hardly be overemphasized, nor was it possible for that publicity to have not affected the trial judge. *Giles v. Maryland*, ___ U.S. ___, ___ Sup. Ct. ___, 17 L. Ed. 737; *Sheppard v. Maxwell*, 384 U.S. 333, 86 Sup. Ct. 1507, 16 L. Ed. 2d 600.

Parenthetically, it shall be stated that it is apparent from the judge's conduct and remarks that he had (1) arrived at an opinion as to the appellant's guilt prior to trial; and (2) had in mind the fact that there was litigation over title to the land. This conclusion necessarily follows from the fact that the trial judge was very aware of the title difficulties in which Lake Mead was embroiled at the time of trial. It should be noted, however, that Lake Mead (LM) has settled all of its title disputes at a cost of approximately \$250,000.00 and has delivered full and complete clear legal title to all land purchasers.

THE UNIVERSITY OF CHICAGO PRESS

CHICAGO, ILLINOIS 60607

1995

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APPELLANT'S MOTION TO DISMISS INDICTMENT, ON THE GROUND EACH COUNT FAILED TO STATE AN OFFENSE AGAINST THE UNITED STATES AND EACH COUNT WAS DUPLICITOUS, SHOULD HAVE BEEN GRANTED ON THE FOLLOWING GROUNDS:

A. Each Count Failed To State Facts Sufficient To Constitute An Offense Against The United States.

1. Introductory Comment. 18 U.S.C.A. Sec. 1341 reads in part:

"Whoever . . . places in any post office or authorized depository for mail . . . "

Each of the counts of the indictment are alleged in identical terms, to wit:

"On or about (date) for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendant *placed* or *caused to be placed* in an authorized depository for mail at Phoenix, within the State and District of Arizona, a letter addressed to (name and address) to be sent and delivered by the Post Office Department of the United States, in violation of 18 U.S.C. 1341." (Emphasis added.)

2. Preliminary Case Authority. 18 U.S.C. 1341 covers only fraud in which use of the mail is a "part of the execution of the fraud," is "incident to an essential part of the scheme" or "for the purpose of executing the scheme." *Parr v. United States*, 363 U.S. 370, 80 Sup. Ct. 1171, 4 L. Ed. 2d 1277. Appellant was *not* charged, in the words of the statute, with having "placed" the matter. Nor was the appellant charged with having "*willfully*" caused the matter to be placed, which would be sufficient under the PRINCIPALS STATUTE, 18 U.S.C.A. Sec. 2(b), as amended, which provides:

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." (Underscored word added by 1958 amendment.)

Thus, by the government's alternative allegation in the one paragraph of each count, which under *Parr* would invoke the mail fraud statute, appellant was not charged with the commission of any crime at all, and the indictment should have been dismissed.

Finally, in determining queries arising from the insufficiency of the allegations, the indictment must be construed in the manner most favorable to the defendant. *Johnson v. United States*, 95 F. 2d 813.

B. Each Count Of The Indictment Was Duplicitous.

1. Introductory Comment. After its revision in 1948, the mail fraud statute in effect charged three separate crimes:
 - (a) To devise a scheme or artifice to defraud;
 - (b) To devise a scheme to obtain money or property by false or fraudulent pretenses, representations, or of promises; and
 - (c) To devise a scheme to sell, dispose of, or loan counterfeit or spurious money.

Each count of the indictment charged the appellant with violation of two of these crimes:

"That Marvin Lustiger, hereinafter referred to as the 'defendant', devised and intended to devise a scheme and artifice to defraud *and* for obtaining money by means of false and fraudulent pretenses, representations and promises from numerous persons . . ." (Emphasis added.)

Therefore, appellant respectfully submits that the indictment, and each count thereof, was duplicitous and should have been dismissed.

2. Preliminary Case Authority. An indictment is void for duplicity when, contrary to Rule 8(a) FRCrP, it charges two separate offenses in one count. *Empire Oil and Gas Corp. v. United States*, 136 F. 2d 868; *United States v. Martinez-Gonzales*, 89 F. Supp. 62. Appellant recognizes that Form 3 (FRCrP App.) seemingly sanctions such duplicity in that there are cases that reject the contention as to duplicity as herein made. See, *e.g.*, *United States v. Culver*, 224 F. Supp. 419.

V

THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING THE
FOLLOWING PRETRIAL MOTIONS MADE BY THE APPELLANT:

A. Motion For Discovery And Inspection Of
Documents (CT 59, *et seq.*).

1. Preliminary Case Authority. *Brady v. Maryland*, 373 U.S. 83, 83 Sup. Ct. 1194, 10 L. Ed. 2d 215; *United States ex rel Almeida v. Baldi*, 195 F. 2d 815; *Barbee v. Warden, Maryland Penitentiary*, 331 F. 2d 842; *United States v. Wilkins*, 326 F. 2d 135.

B. Motion For Bill Of Particulars
(CT 76, *et seq.*)

1. Preliminary Case Authority. *Williams v. United States*, 289 F. 2d 598; *Yeargain v. United States*, 314 F. 2d 881; *United States v. Solomon*, 26 F.R.D. 397.

Washington, D.C., January 1, 1900

My dear Mr. Brewster:

Thank you very much

for the copy of the *Journal of the Academy of Natural Sciences*

of Philadelphia, which I have just received.

I have been very much interested in the account of the
discovery of the new species of *Colaptes* by you and Mr. Silliman.

I am very glad to hear that you have been successful in
your search for new species of birds. I hope you will continue
your work in this field and discover many more new species.

Very respectfully,
John G. Thompson

John G. Thompson
Secretary of the
Academy of Natural Sciences

Philadelphia, Pa., January 1, 1900

I have just received your letter of the 29th inst. and am
glad to hear that you have been successful in your search
for new species of birds. I hope you will continue your work
in this field and discover many more new species.

Very respectfully,
John G. Thompson

Secretary of the Academy of Natural Sciences

Philadelphia, Pa., January 1, 1900

THE INDICTMENT IN WHICH THE APPELLANT WAS CHARGED WAS INVALID AND VOID, IN THAT IT CHARGED CONDUCT WHICH WAS PROTECTED BY THE FIRST AMENDMENT, UNITED STATES CONSTITUTION.

1. Introductory Comment. In framing its indictment, the government took portions of statements contained in appellant's advertising brochures and, based thereon, alleged a "scheme to defraud." It is submitted that portions of appellant's advertising cannot be taken out of context and the appellant charged with a fraudulent scheme based upon such portions alone. The gravamen of the offense of which the appellant was charged was a "scheme to defraud." Surely, the entire advertising brochures, and not just portions thereof taken out of context, must be examined in order to determine whether or not, in fact, a "scheme to defraud" was present. To take a portion of the advertising out of context violated appellant's First-Amendment rights (freedom of speech).

2. Preliminary Case Authority. The principle here under discussion exists in other First-Amendment areas, *e.g.*, obscenity. Thus, a book must be read in its entirety to determine whether it is obscene; portions may not be taken out of context. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 185, affirmed 72 F. 2d 705. Further, the United States Supreme Court in *Roth v. United States* and *Alberts v. California* (decided together) 354 U.S. 476, 77 Sup. Ct. 1304, 1 L. Ed. 2d 1498, approved of the "*Ulysses*" decision and set forth the constitutionally acceptable

definition that the "dominant theme" taken as a whole, must appeal to the prurient interest for a matter to be obscene. See also *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413, 86 Sup. Ct. 975, 16 L. Ed. 2d 1; *Ginzberg v. United States*, 383 U.S. 463, 86 Sup. Ct. 942, 16 L. Ed. 2d 31; *Mishken v. New York*, 383 U.S. 502, 86 Sup. Ct. 958, 16 L. Ed. 2d 56. It is submitted that fraudulent statements, like obscene literature, are not constitutionally protected. But to lose the cloak of constitutional protection, a statement must clearly be fraudulent. It is submitted that the statements attributed to the defendnat herein were not of such a nature that the First Amendment's protections should have been lost. Finally, where First-Amendment protections are involved, there is a presumption that a statute under attack is unconstitutional.

VII

THE COURT COMMITTED PREJUDICIAL ERROR IN MISINTERPRETING AND NOT AFFORDING TO THE APPELLANT THE PROTECTION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN THAT:

A. The Evidence Was Insufficient As A Matter of Law To Overcome The Presumption Of Innocence Which Surrounds A Defendant In Every Criminal Proceeding. [18]

1. Preliminary Case Authority. *Fleischman v. United States*, 339 U.S. 349, 70 Sup. Ct. 739, 94 L. Ed. 906; *Griffin v. California*,

[18] Where, in the outline of appellant's Argument and Preliminary Case Authority, appellant states that the evidence was insufficient as a matter of fact and law to sustain a conviction, appellant also desires to assert as error the denial by the court of his Motion for Judgment of Acquittal, Motion in Arrest of Judgment and Motion for new trial.

380 U.S. 609, 85 Sup. Ct. 1229, 14 L. Ed. 2d 1206; *Wilson v. United States*, 149 U.S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650; *Colt v. United States*, 158 F. 2d 641; *United States v. Bennett*, 152 F. 2d 342; *Boatwright v. United States*, 105 F. 2d 737; *Kaplan v. United States*, 329 F. 2d 561; *State v. Levy*, 113 P. 2d 306 (Wash.); *People v. Hill*, 175 P. 2d 45 (Cal. App. 1946); *Holland v. Commonwealth*, 55 S.E. 2d 437 (Va.)

B. No Specific Wrongful Intent Was Present As Is Required By 18 U.S.C. Sec. 1341 And Which Intent Can Never Be Presumed.

1. Preliminary Case Authority. *Williams v. United States*, 278 F. 2d 535; *Morissette v. United States*, 342 U.S. 246, 72 Sup. Ct. 240, 96 L. Ed. 288.

C. The Undeniable Good Faith Exhibited By The Appellant Was A Complete Defense To A Charge Of Violating 18 U.S.C. Sec. 1341.

1. Preliminary Case Authority. *Gold v. United States*, *supra*, 36 F. 2d 16; *Walters v. United States*, 256 F. 2d 840, *supra*.

D. Appellant Was Found Guilty Under An Indictment And Statute Which Did Not Contain Any Ascertainable Standard Of Guilt.

1. Preliminary Case Authority. *Giaccio v. Pennsylvania*, *supra*, 382 U.S. 399, 86 Sup. Ct. 518, 15 L. Ed. 2d 447; *Bowie v. Columbia*, 378 U.S. 347, 84 Sup. Ct. 1697, 12 L. Ed. 2d 894.

E. The Government Failed To Prove Anyone Was Defrauded By The Appellant's Alleged Misconduct.

1. Preliminary Case Authority. *United States v. Rabinowitz*, *supra*, 327 F. 2d 62; *United States v. Barren*, *supra*, 305 F. 2d 527;

United States v. Brunet, *supra*, 227 F. Supp. 776; *United States v. Schwartz*, 230 F. 2d 537.

VIII

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AND REFUSING TO ADMIT THE FOLLOWING EVIDENCE:

A. Evidence Of Value.

1. Introductory Comment. At the trial of the instant case, while the court permitted evidence of value from customer witnesses (RT 428, 506, 553, 562, 617), it excluded evidence of value from Smith, the at-the-moment-and-in-effect complete owner of all of the lands in question (RT 219). The evidence by way of offer of proof was that the land was worth \$595.00 per acre in its present condition without roads (RT 221). In addition, the court excluded evidence of the \$495.00 sale price (Ex. 5V, 5W, 5X; RT 459-461) for 50' by 112' lots just outside Kingman, Arizona (RT 566). This amounted to approximately \$3,960.00 per acre.

2. Preliminary Case Authority. *Farrell v. United States*, 321 F. 2d 409; *United States v. Bloom*, 237 F. 2d 158.

B. Evidence Of Standards Of The Industry And Related Values.

1. Introductory Comment. On trial, the court excluded the compendia of ads and promotional materials of competitor Mohave County and western subdividers used during the period charged in the indictment (RT 573, 575). These consisted of:

Exhibit E: A compendium of ads and promotional materials used at the same time by competitor Mohave County subdividers, to wit, Lake Mohave Ranchos, Lake

Mead Ranchos, Meadview, Golden Valley and Paradise Acres, etc. (supplemented by Ex. BB-2 - which, by Ex. BB and Stip. No. 9, were established as being authentic pictures of Paradise Acres).

Exhibit CC: A collection of Mohave County publications at the same time showing ads of Mohave County competitors of LM.

Exhibit F: A compendium of ads and promotional materials used, at the same time, by competitor western land subdividers, to wit, Horizon City, Texas, and Rio Grande Estates, New Mexico (as supplemented by Ex. BB-3 - which, by Ex. BB and Stip. No. 9, were established as being authentic pictures of these subdivisions).

At the trial, the court also excluded evidence of the small-tract offerings of the Federal Bureau of Land Management in Arizona and California during the same period (RT 572, 575). It cannot be overemphasized that these proffered exhibits consisted of advertising promulgated by a governmental agency under standards which undoubtedly were approved by the United States Government. In light of this fact, it might even be wondered if the United States Government was not estopped to assert that the appellant engaged in misconduct in his advertising, when that advertising went no further than that of the United States Government^[19]. The

[19] As has been indicated earlier in this brief, had the appellant, Marvin Lustiger, testified, he could have shed much light on many issues presented on this appeal. Specifically, he could have testified as to his familiarity and knowledge of the publications of the Bureau of Land Management, including their advertising practices and the prices they charged for land sold by the Bureau.

exhibits referred to consisted of:

Exhibit G: A compendium of the offerings of the Bureau of Land Management, a governmental agency, of small tracts in Arizona, and its publicity attendant thereto - as more fully disclosed by Stip. No. 5, which said tracts were offered at Apache Junction, Liberty, Yucca, and Snowflake (supplemented by Ex. BB-1 - which, by Ex. BB and Stip. No. 9, were established as being authentic pictures of the lands covered by these offerings).

Exhibits AA, AA-1, AA-2, AA-3, AA-4 (covered by Stip. No. 8): A compendium of certain offerings of the aforesaid Bureau of Land Management of small tracts in California, and its publicity attendant thereto, together with concededly authentic pictures of the lands covered by these offerings.

These documents, as to which the government reserved solely an objection as to materiality, were offered:

- (a) to establish the standards of the industry of which LM was a member;
- (b) on the issue of value; and
- (c) to support defendant's position that the government had failed to prove bad faith.

Concededly, unless the materials of Mohave County subdivider competitors (Ex. E) were admissible, the materials of out-of-state competitors were not admissible. Hence, argument here will be confined to what the materials of the Mohave County

subdividers proved. As to the Federal Bureau of Land Management offerings and materials, defendant concedes similarly that if data as to the Arizona small-tract offerings during the period were not admissible, data as to the California small-tract offerings were clearly not admissible. And so, as a predicate for the argument that follows, reference herein is solely to the Federal Bureau of Land Management's small-tract offerings in Arizona and, for brevity, is limited primarily to the Bureau's Apache Junction, Arizona, offering.

Exhibit E demonstrates:

(1) Although every Mohave County subdivision has the same checkerboard pattern as that of LM's subdivision (Ex. 24A), not one of the competing subdividers - any more than LM - disclosed this in their materials (Ex. E: Lake Mohave Ranchos - Sheet 2, 3, 4, 5 (all on last page), Sheets 6, 8, 9, 12; Lake Mohave Estates - Sheet 18 (back page); Lake Mead Ranchos - Sheet 20 (back page), Sheet 21; Meadview - Sheet 24; Golden Valley - Sheet 31, 36; Paradise Acres - Sheets 37, 38, 39).

(2) These competitors used an imagination in the naming of their subdivisions that far outdid LM's naming of its subdivision. Thus, for example:

- (a) Lake Mohave Ranchos, located down the road from LM's subdivision, is a far piece from anywhere near Lake Mohave [20] (although its maps, like those of LM, clearly disclosed the distance)

[20] The standard text of its ads (Ex. E: Sheets 6, 7, 8, 9) lends support to this imaginative naming of a subdivision:

(b) "Meadview" has less than 100
"view" lots (RT 514).

(3) All of the competitors display in their materials a flamboyancy that exceeds that of LM's materials. For example:

"Consider, then, the fact that Lake Mohave Ranchos is virtually surrounded by Lake Mead Recreational Area" (Ex. E: Sheet 1, p. 4; Sheet 2, p. 8)

"If you want to fish . . . it's just minutes away" (Ex. E, Sheet 1, p. 9)

"Here you will find a planned community . . ." (Ex. E, Sheet 21)

"near Las Vegas and Kingman" (Ex. E, Sheet 2, p. 11)

"electric power lines have been constructed to provide power" (Ex. E, Sheet 5, p. 8)

"power lines are being extended" (Ex. E, Sheet 7, 8)

"Lake Mohave Ranchos are a planned development" (Ex. E, Sheet 9)

"nestled in a huge bend of the Colorado River" (Ex. E, Sheet 18)

"Panoramic acre Homesites overlooking fabulous Lake Mead . . . 2 miles from the shore of Lake Mead" (Ex. E, Sheet 23)

[20 cont'd]

"Where Are The Lake Mohave Ranchos Located

"Just a short drive from fabulous Las Vegas, Lake Mead and Boulder Dam. Lake Mohave Ranchos are also in close proximity to bustling and rapidly expanding Kingman, Arizona. Lake Mohave is fed by the Colorado River which offers the Southwest one of the finest resorts in the nation. It is 68 miles long and abounds in trout and bass. Lake Mead, Lake Mohave and Lake Havasu are all part of the Colorado River, and are separated by 3 large dams that supply power for progress in the southwest."

"Hurry only 60 days left to own your 2-1/2 acres in Golden Valley . . . Prices subject to change as land values rise" (Ex. E, Sheet 31)

(4) The price of land in the nearby competing subdivisions greatly increased during the period charged in the indictment and, in every instance, exceeded LM's price for its acreage (\$395 and then \$495 per 1-1/4 acre or \$316 and then \$396 per acre). Thus:

- (a) Lake Mohave Ranchos' price was \$395 per acre and increased to \$895 per acre (Ex. E, Sheets 1-17);
- (b) Lake Mohave Estates' price was \$495 per acre and increased to \$595 per acre (Ex. E, Sheets 18, 19);
- (c) Lake Mead Ranchos' price was \$695 per acre (Ex. E, Sheet 20);
- (d) Meadview's prices started at \$795 per acre (Ex. E, Sheet 23-30);
- (e) Golden Valley's price was \$995 for 2-1/2 acres (or \$398 per acre) and increased to \$1,195 for 2-1/2 acres (or \$478 per acre) (Ex. E, Sheets 31, 35);
- (f) Paradise Acres' price was \$476 per acre (Ex. E, Sheet 38).

Stipulation No. 5, relating to the Federal Bureau of Land Management offerings, establishes that in connection with the U. S. Government Bureau's offering to the public for sale 2-1/2 or 5-acre

tracts it used and distributed the pamphlets that are Sheets

1-4 of Ex. G. These pamphlets represent that:

(1) Under the Small Tract Act citizens obtain lands "for residences, recreation, or business purposes" (Ex. G, Sheet 1, p. 3)

(2) "Under the small tract law, small parcels of vacant public land may be leased or sold if they are chiefly valuable for residential, recreation, business, or community sites. * * * To qualify as a residential site, land must be suitable for seasonal or year-round use as a home for a family." (Ex. G, Sheet 1, p. 5)

(3) "How much will I have to pay for my small tract? At the time the land is classified, it is appraised at its fair market value, consistent with other land values for similar lands in the area. The price varies according to the character, location, and desirability of the land. Land near towns or cities is likely to have a higher value than land in more distant and isolated areas. Also, land fronting on roads, streams, or lakes is more valuable than land not having such frontage." (Ex. G, Sheet 1, p. 22)

(4) "The Small Tract Act of 1938 provides a means whereby a person can obtain land for a homesite, business site, or recreation site, if the land is opened by the Bureau. These tracts may be up to five acres in size." (Ex. G, Sheet 4, p. 9)

The United States Government Agency also secured general publicity for its offerings, such as is shown by Sheet 4A of Ex. G. Note, for example:

"Per-acre appraisals may range from \$100 to more than \$1,000 depending on the location of the land and other factors. Land which appeared practically worthless a few years ago, Helmandollar pointed out, has since become valuable for esthetic or other reasons."

The offering circular by which the Apache Junction lands were offered read in part:

"The center of the Apache Junction Area is at the intersection of the Apache Trail and Highway U.S. 60-70-80-89, and is 32 miles east of Phoenix, Arizona, on the lower southwestern slopes of the Superstition

Mountain Range. The population is approximately 8,500 permanent residents. Three water companies service the area, electricity is available in all but the remote portions, and natural gas is being extended into outlying areas.

"The subject lands are situated on the eastern fringe of the Apache Junction Area and are north of the U. S. Highway 60-70-80-89, and east of the main access road running northerly through the NE 1/4 Sec. 35, and they are considered equally desirable and potentially suitable for desert homesite development. The tracts can be identified by finding the brass cap survey markers for the east quarter corner and the west quarter corner of Sec. 36, and by finding the reference corners for the northwest section corner and the north quarter corner of Sec. 36. Electricity is available to this neighborhood from a power line running along the western boundary of Sec. 25 and the NW 1/4 Sec. 36. Natural gas and water are available at the Palm Springs development 2-1/2 miles to the west, and can be extended into these lands as soon as sufficient demand exists. There are no zoning restrictions. The lands are accessible from U. S. Highway 60-70-80-89 by a graded, gravel road leaving this highway 3.5 miles southeast of Apache Junction, thence northeastward to the point of intersection with the north section line of Sec. 35. A recently cleared and graded road runs eastward along the line for 1/4 mile to the northwest corner of the land, and continues east along the north side of Sec. 36, giving access to the northern portion of the area. The southern portion is accessible from a point on the U. S. Highway 4.25 miles southeast of Apache Junction, then northerly over unimproved roads and trails into the subject land.

"The topography of the NW 1/4, NE 1/4 SW 1/4 and the N 1/2 N 1/2 SE 1/4 Sec. 36, is quite flat, with a very gentle slope. Two main and several very small shallow washes traverse the area.

* * * * *

"The highest and best use for these lands is for desert homesite development.

* * * * *

"Bids sent by mail will be considered only if received at the Arizona Land Office, Bureau of Land Management, 3022 Federal Building, Phoenix 25, Arizona, prior to 3:00 P.M., March 23, 1962." (Ex. G, Sheet 5)

The publicity release of the U. S. Government Agency, relating to the Apache Junction offering, read:

"Seventy-nine home sites on federal land near Apache Junction will be sold at public auction in Phoenix March 29." (Ex. G, Sheet 8)

The free newspaper publicity attendant upon said sales said:

"Helmandoller said the tracts are potentially suitable for desert homesites. Electricity is available on the neighborhood from a power line along the Apache Trail.

"Natural gas and water is available at Palm Springs subdivision, 2-1/2 miles to the west. There is no zoning restrictions. All mineral rights are reserved by the government.

"Seventy-nine home sites on federal land near Apache Junction will be sold at public auction in Phoenix March 29, the Bureau of Land Management said yesterday." (Ex. G, Sheet 9)

This type of publicity was sought from host of Arizona news media (Stip. No. 5, par. H, BB, CC, DD; Ex. G, Sheets 28-31).

None of the parcels were staked and there was neither water nor any other utility services (electricity, gas or telephone) available at or on the boundaries of said parcels^[21]. There were no roads, bladed or otherwise, leading to said parcels or the boundaries, except for those shown by a map that was available at the Bureau of Land Management office (Stip. 5, Par. L)^[22].

The parcels sold for prices ranging from \$800.00 to \$1,182.00 per acre (Stip. 5, Par. K).

[21] This was true of all of the other Federal Bureau of Land Management offerings in Arizona - at Liberty, Yucca, and Snowflake (Stip. No. 5, Par. Q, V, FF).

[22] As to the Snowflake offering, there were no bladed roads at all leading to the tract or its boundaries (Stip. No. 5, Par. FF).

It was shown that the parcels contained washes 15 to 20 feet wide covering an acre of land; and there were gorges in which could be hidden a car (RT 521) and that all of the parcels on the south were mountainous (RT 522).

Purchasers of parcels received patents (Stip. No. 5, Par. M, Ex. G, Sheet 7A) under which the government reserved a 25' boundary right-of-way for roadway and public utilities purposes. Since this reservation does not run to the benefit of surrounding parcels, it is obvious that the patent, without more, created land-locked parcels without legal right to access.

Exhibit G thus demonstrates that the government, which is and has been the biggest in the field of sales of unimproved lands (truly the leader of the industry), used (and for free) practically every promotional technique that LM and all others in the field used. Note that the gullible would be bound to believe that he was buying a "homesite." Note, too, that by the very text of the government's "brochure," the gullible might naturally be led to believe that by virtue of what was said (" . . . electricity is available . . ."; "natural gas and water are available") and what was not said (note the absence of indication of whether the tracts are staked and the inference from the reserved right-of-way statements that the roads lead to the individual tracts) he was getting a tract ready for immediate city-like occupancy. Truly, the big difference between the U. S. Government's offerings and those of LM is that the government demanded cash whereas LM permitted time payments.

2. Preliminary Case Authority. *United States v. Brandt*, 196 F. 2d 653; *United States v. Sprengel*, 103 F. 2d 876; *Silkworth v. United States*, 10 F. 2d 711.

C. Opinion Evidence

1. Introductory Comment. The court excluded (RT 530) the opinion evidence of the former President of the Arizona League of Land Developers and one of the leading subdividers in Mohave County (RT 447). By stipulation (Stip. No. 3), the authenticity and competency of this opinion was conceded by the government, with the government's sole reservation being as to materiality. This opinion was based upon a review of LM's sales and promotional materials in comparison with those of other land sale companies as used during the period charged in the indictment. The opinion was:

"* * * In my opinion the advertising representations and materials, sales techniques and devices used by Lake Mead Land and Water Company during 1961 and 1962 were well within the range of advertising representations and materials, sales techniques and devices generally and customarily deemed proper during that period, and generally and customarily used during that period by land subdividers who then were and now are considered entirely proper and ethical by the industry itself and the public as a whole. * * *" (Ex. A)

2. Preliminary Case Authority. *United States v. West Coast News Company*, 228 F. Supp. 171; *Senn v. Lackner*, 91 Ohio App. 83, 100 N.E. 2d 419; 100 N.E. 2d 432; 105 N.E. 2d 49; 107 N.E. 2d 588; *Sparkhill Realty Corp. v. State*, 4 N.Y.S. 2d 674, 4 N.Y.S. 2d 1023, affirmed 279 N.Y. 656, 18 N.E. 2d 301, based on 268 N.Y. 192, 197 N.Y. 192; *Sheldon v. Moredal*, 29 F. Supp. 729; *Rolf v. Bird*, 239 F. 2d 257; *United States v. Wood*, 226 F. 2d 924; *Grismore v.*

D. Other Errors and Excluding Evidence

1. The admission of Ex. 42, the deed by which LM conveyed to the customers who paid in full. This could only have been admissible if LM's title difficulties were at bar - yet the government had stipulated they were not (Stip. No. 10, par. 36). In any event, it was inadmissible in view of the judicially noticeable fact that it is the form of deed which every title company uses to convey title.

2. The exclusion of Ex. B and B-1, the Palm Springs exhibits, the materiality of which was to demonstrate that a checkerboard ownership pattern is no real impediment to the development of a thriving city.

3. The exclusion of Ex. D, the Department of Commerce Dale Carnegie bible on tourism in which Uncle Sam encourages, among other things, the use of "imagination" in the naming of attractions and from which any reader would feel perfectly justified in conceiving that it was an appropriate sales technique to call a cattle tank used by kids for summer dunkings as a "favorite swimming hole."

ORIGINAL ARTICLES

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DEFENDANT'S CONVICTION MUST BE REVERSED FOR THE REASON THAT HE WAS DEPRIVED OF EFFECTIVE REPRESENTATION OF COUNSEL, IN VIOLATION OF AMENDMENT VI, UNITED STATES CONSTITUTION.

1. Introductory Comment. By affidavit, defendant has heretofore filed a Motion for Remand for Purpose of Presenting a Motion for New Trial, In the Alternative, a Motion for Reference to Take Additional Evidence. Basically, the contentions stated in defendant's motion, and supported by affidavit, are that the defendant's counsel was mentally incompetent to conduct the trial of the defendant and had a personal conflict of interest adverse to that of the defendant while trying the case on behalf of the defendant. It is defendant's further contention that the mental incompetence of his counsel and the above-referred to conflict of interest resulted in the defendant's counsel advising defendant and his wife not to testify. The affidavits heretofore filed by defendant in support of his motion indicate that defendant and his wife could have supplied valuable evidence which could very well have led to defendant's acquittal.

Necessarily, the record does not disclose the inadequacy of counsel, and all of defendant's contentions in relation to this issue were raised in affidavits in support of the above-referred to motions. It is nevertheless hoped, because of the seriousness of the issue and the charges made by the defendant, that this Court will treat this issue as part of the instant appeal. The fact that this issue may be raised upon a Motion for New Trial, even if this Court affirms the conviction of the defendant, would

seem to constitute a very good reason for this Court entertaining the issue here under discussion, rather than waste the court's time with a new trial.

2. Preliminary Case Authority. *Glasser v. United States*, 315 U.S. 60, ___ Sup. Ct. ___, 86 L. Ed. 688; *Brubaker v. Dixon*, 310 F. 2d 30; *Cord v. Smith*, 338 F. 2d 516; *Tucker v. United States*, 235 F. 2d 238; *Randazzo v. United States*, 339 F. 2d 79; *United States Ex Rel Miller v. Myers*, 253 F. Supp. 55; *People v. Davis*, 48 Cal. 2d 241, 309 P. 2d 1; Rule 33 Federal Rules of Criminal Procedure.

CONCLUSION

The Judgment of Conviction should be reversed with appropriate directions to the trial court in the event the appellant is tried again.

Respectfully submitted,

MARKS & SCHNEIDER

BY: BURTON MARKS

Attorneys for Appellant

3. $\frac{1}{2}$ of 100 = 50

with those rules.

B. H. H. H.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

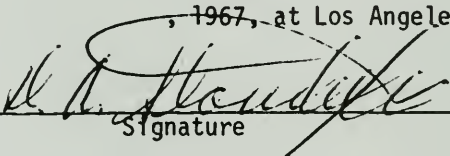
I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on _____, 1967, I served the within APPELLANT'S INTERIM OPENING BRIEF (Lustiger vs. United States) on the following named party, by depositing a copy thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

U. S. Attorney's Office
Miss Jo Ann Diamos
Assistant U. S. Attorney
412 Post Office & Federal Bldg.
Tucson, Arizona

I declare under penalty of perjury that the foregoing is true and correct.

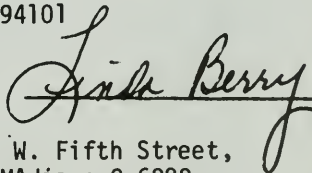
Executed on _____, 1967, at Los Angeles, California.



Signature

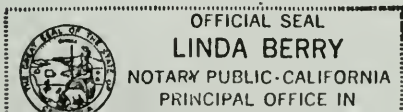
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My Commission Expires Nov. 4, 1968



THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

1900

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO
FROM THE FACULTY OF THE UNIVERSITY OF CHICAGO

Resolved, That the Faculty of the University of Chicago
do hereby express its appreciation of the services
of the President of the University of Chicago
and its confidence in his ability to continue to
conduct the University in the most efficient
manner possible.

W. D. H. [Signature]
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